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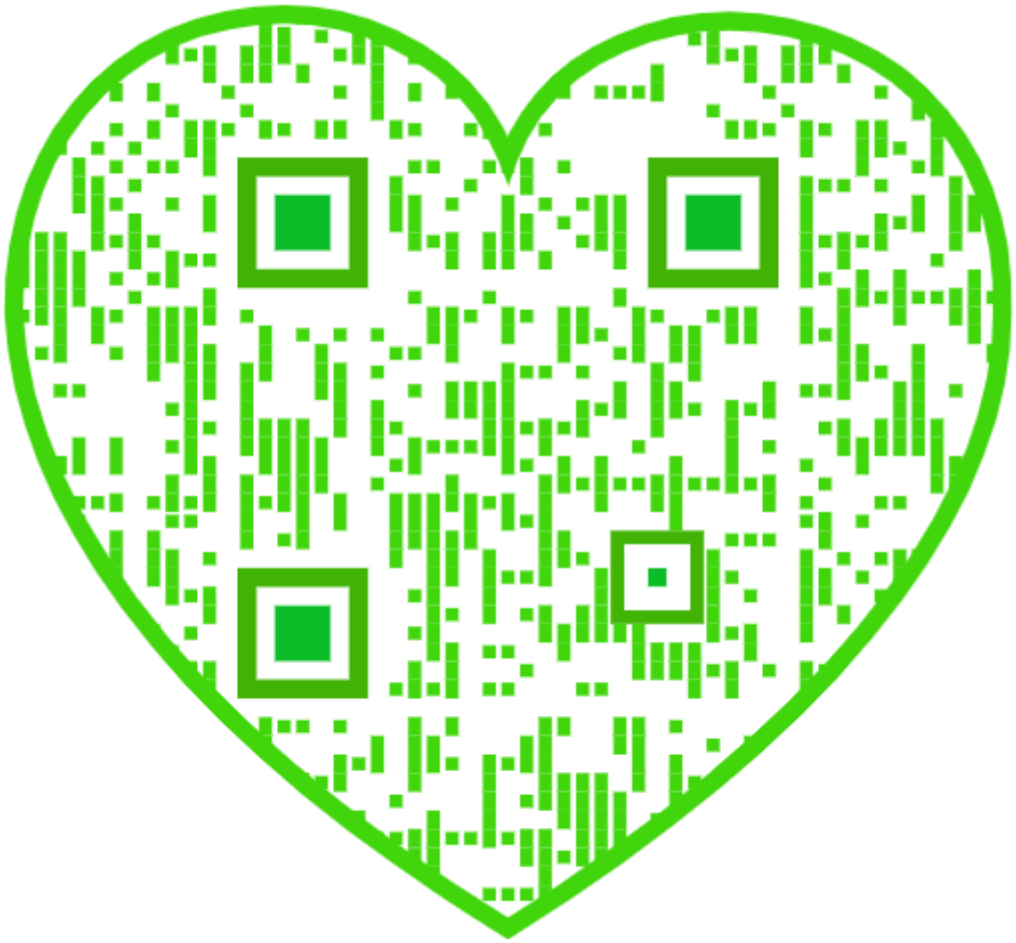

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OUTLINE OF INTERNATIONAL LAW

CHAPTER I.

GENERAL CONCEPTIONS.

§ 1. **Definition and scope of subject.** International Law is that body of rules which civilized nations have accepted as being binding upon them in their relations with one another. The world-wide development of industry and commerce and the resulting growth of political and social interests between nations have so tremendously enlarged the scope of international activities, that a well-defined system of rules governing their conduct has become necessary to international peace and good faith. The rules of international law promote the interests of peace by guaranteeing to states the rights of independence and inviolable sovereignty; in demanding strict neu-

trality from nations not parties to a conflict, and by granting immunity to diplomatic agents and surrounding them by every safeguard, they have fostered relations of mutual faith and confidence, paving the way for international arbitration; they have mitigated the horrors of war by forbidding inhuman practices and making special provisions for the care of sick and wounded; they have encouraged the growth of international commerce and industry by securing the protection of the life and property of the alien and by freeing it as far as possible from the useless destruction of war. The laws of nations are as necessary to the peace and prosperity of the family of nations as domestic laws are necessary to the life and security of the individual.

In defining international law many writers have divided it into two branches, public international law, and private international law. The former treats of international law as defined above, as dealing with the duties and obligations of one nation to another; while the latter "treats of rules and principles which are observed in cases of conflict of jurisdiction in regard to private rights" (1). In the latter the question in controversy is between individuals and not states, and a better term for that branch of law is that given by Judge Story, "Conflict of Laws" (See Volume IX of this work). In this discussion the term International Law will mean only public international law.

§ 2. **Nature and sources of international law.** Many writers in defining international law define it as having

(1) Wilson and Tucker, International Law, p. 4.

its source in reason or justice, implying that what is right or just between nations is the law of nations. Here there is evident confusion. The rules which civilized nations accept are the rules of international law, regardless of their moral or rational quality. In determining whether a given rule is a part of international law, the vital question is, have the nations so accepted it? As new problems arise demanding new legal remedies, that rule which is most rational and just is the one most likely, perhaps, to be accepted, but it will be its acceptance by the nations and not the justice of the rule that gives it the binding character of law. This is clearly emphasized in the case of the Scotia, where the question was directly raised as to what determined the law of the sea. Mr. Justice Strong, speaking for the court, said: "Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin . . . it has become the law of the sea only by concurrent sanction of those nations who may be said to constitute the commercial world" (2).

It follows from the above, then, that international law derives its real authority from the general consent and acceptance of civilized states. Treaties, court decisions, diplomatic correspondence, decisions of boards of arbitration, and state papers are the primary sources from which the general usages and customs of these nations may be ascertained, and they will show what rules of law

(2) 14 Wallace, 170.

have been expressly or impliedly accepted. The text-writers, who have collected and collaborated all of this material and deduced from it certain rules of accepted conduct, furnish the secondary sources of international law. But these writers do not make the law, and their rules may or may not be the law, accordingly as their deductions have been erroneous or correct.

§ 3. **History of international law.** While the history of international law is generally traced back to the days of Greece and Rome, the history of modern international law, as we understand it to-day, begins with the peace of Westphalia in 1648. It was then seen that the "old doctrines of world empire, whether of pope or emperor, could no longer be sustained." The idea of sovereign states, with interstate relations and the necessity of conformity to fixed rules, became firmly established. International law began to be studied with a new zeal. Questions of the balance of power, of neutral trade, and of contraband of war were widely discussed, and numerous commercial treaties entered into. The second epoch of this modern period begins with the treaty of Utrecht in 1713. The treaty itself recognized many of the principles which had gained acceptance since 1648. The increasing influences of the new world in European politics became apparent. The American Revolution as well as that of the French showed clearly the need of more stringent rules of neutrality. Boundary disputes were settled along lines laid down in the Roman law. Diplomatic relations received larger attention than ever before, resulting in the determination of the precedents and dignities

of diplomatic agents. The treaty of Vienna in 1815 marked the beginning of the present epoch. Here the discussions differ from the earlier ones in that they are now based upon what the law is rather than what it ought to be. The present problems are being worked out largely along lines of commercial and industrial development, towards greater comity, and, it is hoped, towards the ultimate achievement of international peace.

§ 4. **International law part of municipal law.** The proposition that international law is a part of the domestic law of the United States was clearly upheld in the case of the Paquette Habana, where the question was raised, whether the law of nations protected small fishing smacks of the enemy from capture, and, if so, was the law of nations a part of the municipal law of the United States. In giving its decision the court said: "International law is a part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative acts or judicial decision, resort must be had to the customs and usages of civilized nations" (3). In the case of the Charming Betsy (4), Mr. Chief Justice Marshall observed: "An act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains, and consequently can never be construed to violate neutral rights,

(3) 175 U. S. 677.
(4) 2 Cranch, 64.

or to affect neutral commerce further than is warranted by the law of nations as understood in this country." Whether or not the law of nations is a part of domestic law is itself purely a question of domestic law.

§ 5. **Sovereign states are the persons in international law.** Private law deals directly with the rights and obligations between individuals. International law deals with the rights and obligations between sovereign states. But what is a sovereign state? Since it is a person in international law, it must possess such attributes as will enable it to perform those obligations which a person in international law is legally bound to perform. To do this it must be supreme within its territory, in order that it may guarantee to other states the proper protection of aliens and their property; it must be independent in its external control, in order that it may be untrammeled in the performance of its legal duties and treaty obligations; it must have sufficient evidences of permanency to guaranty a reasonably continuous existence; and enough civilization to indicate an appreciation of the binding character of law (5). This debars the Indian tribes as being externally subject to another power, and excludes semi-barbarous peoples as being unappreciative of the sanctity of law and incapable of affording adequate protection to the property and citizens of foreign states. The necessity of external independence was set forth in the case of the Checharkieh (6). In this case a boat belonging to the khedive of Egypt, being sued for

(5) Hall, International Law, p. 20.
(6) L. R. 4 Adm. and Ecc. Cts. 59.

damages done to another ship, set up the defense that the boat belonged to the khedive of Egypt, and was therefore entitled to the immunity of a public ship. The court, after reviewing the facts that Egypt was a part of the Ottoman Empire, that this empire levied the taxes, controlled the armies, and made the treaties for Egypt, held that: "All these facts, according to the unanimous opinion of accredited writers, are inconsistent and incompatible with those conditions of sovereignty which are necessary to entitle a country to be ranked as one among the great community of states", and therefore the ships of Egypt are not to be accorded the immunity which attaches to the public ships of sovereign states.

§ 6. **Distinction between a government and a state.** Careful distinction must be made between the government and the state, for it is the state and not the government, that is a person in international law. The government is only the agent of the state. Consequently any changes in the government which do not interfere with its ability to perform its international obligations, do not effect a change in the identity of the state. If this were not so, then those states having treaties with a state about to change its government would interfere to prevent the loss of their treaty rights. Such a theory would obviously lead to the constant intermeddling in the internal politics of nations. States may change their form of government, or acquire territory, or cede portions of their domain, without losing their identity, and, therefore, without relinquishing their claims or escaping their obligations under existing treaties and laws. However, where the

state is broken up and divided among other states, as the absorption of Poland by Russia, Austria, and Prussia, in 1795, or where a state is annexed to another by conquest of war, as the conquest of the Orange Free State by Great Britain in 1901, or where two states combine to form a third state, the identity of the absorbed states is lost.

§ 7. **Part-sovereign states.** Part-sovereign states, as known to international law, are states where the external sovereignty is partly exercised by other states, or partly suspended altogether. The division of internal sovereignty is only remotely and indirectly connected with international law and will not be treated here. That is properly a matter of constitutional law. The German Confederation from 1815 to 1866, which left to the local states certain powers of external sovereignty and which gave other powers to the confederation, is an example of a part-sovereign state. A neutralized state, where certain of its external powers have been taken away for the purpose of neutralization, as where Switzerland was deprived of the right to wage offensive wars, and the establishment of protectorates and suzerainties are other examples. A state under the protectorate of another state possesses all the rights of external sovereignty, except those which have been specifically resigned, while states under suzerainty possess only such powers of external sovereignty as a suzerain power specifically grants. The South African Republic, under the protectorate of England by the agreement of 1884, and Bulgaria, under the suzerainty of the sultan of Turkey as

provided by the first article of the treaty of Berlin are typical examples.

§ 8. **Recognition of new states.** Theoretically, a nation has the right to enter the family of nations as soon as it possesses the necessary attributes of a state. But of this the states are the judge, and their recognition of the new state marks its advent within the pale of international law. This recognition may be by individual states from time to time as each sees fit, or it may be by the collective action of several, as the reception of Turkey into the family of nations by the treaty of Paris of 1856. The recognition may be formal as by public proclamation, treaty, the sending or reception of ambassadors, the salute of the flag, etc., or it may be merely implied from any state act indicating the recognition of international rights and obligations. The states so recognized may be either states heretofore considered as barbarous or uncivilized, as in the case of Turkey, Persia, China, or Japan; or states which have been formed by "civilized men in hitherto uncivilized countries," as in the cases of the South American republics or the Congo Free State; or states whose independence has been achieved through a successful revolt, as in the case of the United States in 1783 and the Texan Republic in 1837. Where a new state is formed by the union of two or more existing states, recognition then usually follows as a matter of course. The recognition of a state is irrevocable and binds only the recognizing and the recognized states, since each state has a right to determine the matter for itself. In the case of recognizing the independence of a revolting

community, great caution must be taken, for, if recognition takes place before the revolting section has in fact achieved its independence and thus vindicated its rights as a sovereign state, the parent state may properly object to the recognition as an act of intervention. The recognition of the United States by France in 1778, when the contest was at its height and the outcome very uncertain, amounted to an act of intervention which the parent state had a right to resent by war (7). The question of recognition is a political and not a judicial question (8).

§ 9. **Recognition of belligerency.** Before a revolting community can justify its claim that it is waging war and not insurrection, and become entitled thereby to the belligerent rights of an independent state, it must have a well organized and responsible government, occupying well-defined territory, and carrying on a conflict of threatening proportions with the parent state, waged for political ends and in accordance with the laws of war. Not being yet a state, it cannot enjoy the privileges of a state in making war, unless the rights of belligerency are accorded it. In other words, the conflict between the two forces is not regulated by the rules of law. In order to avoid this, the recognition of belligerency is frequently accorded by the parent or other states, when the revolt has reached such dimensions as to amount to a public war. Recognition by the parent state extends to the belligerents all the rights of war that a state may possess, frees the parent state from the responsibility of anything

(7) Lawrence, Principles of International Law, 87-90.

(8) Thompson v. Powles, 2 Simons, 194; Jones v. U. S. 137 U. S. 202.

taking place within the revolting territory after the date of recognition, and confers upon the parent state also the rights of a belligerent, giving to both parties the right to maintain blockades, to demand and enforce the observance of neutrality, to establish prize courts, and to do all other acts allowable in war. When a third state alone recognizes a belligerency, it has the same effect as recognition by the parent state, but only in regard to relations between itself and the two belligerents. Recognition by other states than the parent state is not allowable, however, except where the conflict is of such a nature that the recognizing state, because of its proximity to the seat of action or of its commerce upon the sea, has a necessary interest. "The reason which requires and can alone justify the step (recognition of belligerency) by the government of another country, is, that its own rights and interests are so far affected as to require a definition of its own relations to the parties. . . . A recognition by a foreign state of full belligerent rights, if not justified by necessity, is a gratuitous demonstration of moral support to the rebellion, and of censure upon the parent government" (9).

§ 10. **Effects of changes of sovereignty.** When a new state is formed by securing its independence from the parent state, it loses all the personal contract rights and is freed from all the personal obligations of the parent state. The parent state still continues its identity, and is therefore entitled to all rights secured to that state and still bound to all its general or personal obligations. On the other hand, local rights concerning the lost territory,

(9) Dana's Wheaton, 34, note 15.

such as rights under treaties relating to the cession of such territory and its boundaries, and obligations of a purely local nature pertaining to the lost domain, such as the use of rivers running through the territory, or the payment of local debts contracted for local objects and secured upon local revenues, belong to the new state. When a portion of a state is ceded to another state, the general rule seems to be as laid down by Westlake that: "Territory transferred from one sovereign to another, whether by way of cession or of conquest, is taken over subject to all those rights of third states which may be said to inhere in the soil like the easements or servitudes of private law, but free from all those obligations which were merely personal to the late sovereignty, though they might have had to be performed on the soil" (10). When one state is wholly absorbed by another, the absorbing state acquires all the local rights, obligations, and property of the absorbed state. In regard to the treaties concluded by the annexed state, it is clear that, whenever these interfere with the fixed policies or constitutional provisions of the annexing state, they are annulled. The absorbing state becomes liable for the whole of the debt of the acquired state. Thus, it was held in the Texan Bonds case (11) that, when Texas came into the United States, the latter then became bound to see that the debts of Texas to foreign states were paid. When Great Britain and France demanded the right to trade with Texas, under the terms of a former treaty with her, the United

(10) Lawrence, 92-96.

(11) 1 Wharton's Digest, 20-23.

States held that trade with Texas would be subject to the same regulation as trade with any other portions of the country (12). The change of sovereignty from one state to another does not affect private rights and obligations. "A cession of territory is never understood to be a cession of the property belonging to the inhabitants. . . . The cession of territory by its name from one sovereign to another, conveying the compound idea of surrendering at the same time the lands and the people who inhabit them, would be necessarily understood to pass the sovereignty only, and not to interfere with private property" (13).

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(12) Lawrence, 91.
(13) U. S. v. Perchman, 7 Peters, 51.

CHAPTER II.

INDEPENDENCE AND EQUALITY OF STATES.

§ 11. **Right of existence and independence.** The whole system of the law of nations is based upon the assumption that states which are admitted as persons in international law are in possession of certain rights and bound by corresponding obligations. The modern doctrines of the law originated in the realization that the hopes of a world-wide empire were forever shattered; that, instead of one mighty ruler governing the civilized world, there would be many states ruled by many sovereigns; that these must have frequent and varied relations and intercourse with one another; and therefore that the peace and order of the civilized world could only be secured by the mutual recognition of the fundamental rights of states and the adoption of such rules of international conduct as would lead to their better observance. Thus the old idea of only one supreme state was replaced by the idea of several states, each possessing the fundamental rights of national independence. Independence has been defined as "the right of a state to manage all its affairs, whether external or internal, without interference from other states, as long as it respects the corresponding right possessed by each fully sovereign member of the

family of nations'' (1). From these fundamental rights of independent existence flow practically all of the rights and duties prescribed by international law. As the individual's right to life and liberty forms the foundation for most theories of politics and government, so the rights of the nation to existence and independence have been the basis upon which the laws of nations have been builded.

The independence of a state is not lost by the mere fact that it has accepted self-imposed restrictions upon its freedom. Mutual concessions between states are often necessary to their convenience and welfare. Such limitations are frequently imposed by treaty, as where the United States and England in the Clayton-Bulwer treaty of 1850 voluntarily bound themselves to acquire no territory in Central America (2).

§ 12. **Extra-territorial acts in self-defense.** While it is perfectly clear that the theory of the independence of a state makes any interference with that state illegal, yet, by the same theory, there has grown up a practice whereby a state may violate such rights when justified as necessary to its own independence. In such cases, it is said the obligation to recognize the rights of another state is suspended. States may, under certain conditions, enter upon foreign territory for the purpose of preventing an attack upon their own government by persons making the foreign government a base of operations against them. To justify such action, however, the danger must be so

(1) Lawrence, 119.
(2) Treaties of the United States, p. 441.

great and immediate, or beyond the power of the invaded state to prevent it, that it is in fact a necessary act of self-defense against the violation of its own territorial sovereignty. The acts performed by the invading states, should, however, be confined to those which are barely necessary for self-protection (3). During the Canadian rebellion in 1838, a large number of insurgents seized an island in the Niagara river, and, having supplied themselves with arms, prepared to cross over into Canada by means of the steamer Caroline. To prevent the crossing, the Caroline was boarded by English officers while in American waters and the ship destroyed. The United States complained of the invasion of her territory. The British government replied that there was no alternative since there was no opportunity to apply to the government, that invasion was imminent, that therefore there was no time for deliberation, and finally, that nothing more was done than necessary in self-defense. The matter was then dropped by the United States (4).

§ 13. **Intervention.** "Intervention takes place when a state interferes in the relations of two other states, without the consent of both or either of them, or when it interferes with the domestic affairs of another state irrespective of the will of the latter, for the purpose of either maintaining or altering the actual conditions of things within" (5). It differs from extra-territorial acts done in self-defense in that the latter are acts generally performed upon the territory of the invaded state, in self-

(3) Hall, 267.
(4) Parl. Papers, 1843; 1 Whorton, sec. 50, c.
(5) Hall, 278.

defense against a local attack or infringement of its jurisdiction, while intervention is interference in the internal or external affairs of the state itself. Both are forms of intervention, but the term is generally applied to cases of the latter description. It must not be forgotten that intervention must be dictatorial interference and must not be confused with good offices, mediation, or intercession, which are merely different forms of service rendered by friendly powers in the interests of peace (6).

§ 14. **Interventions of right.** There are two kinds of intervention, that which is of right, and that which is only justifiable. Since independent existence is a fundamental right of a state, it follows that the right of intervention can only accrue where there is a legal restriction upon the independence of the state concerned, and where the state is in duty bound to submit to the interference. Where there is no such restriction upon the state's independence, there can be no right of intervention and no duty to submit to it. But, in the absence of any restrictions upon the independence of the state, there may be conditions which, while they do not give the right of intervention, do justify such interference. In such cases the universal obligation of states to recognize the rights of independence is suspended, and the state may interfere without violating international law. Since there is no right to intervene, however, there is no duty on the part of the state to submit and it is perfectly lawful for it to resist the intervention with force. Examples of intervention of right are found in the right of a suzerain power to in-

(6) 1 Oppenheim, International Law, 188-89.

tervene in certain affairs of the vassal, or the right of the protecting state to control the external affairs of the protected state. Another example is where a state is restricted by treaty in its internal independence, in which case the other nations to the treaty have a right to intervene if the nation does not comply with the provisions of the agreement (7).

§ 15. **Interventions that are only justifiable.** As we have already seen, independence is one of the fundamental rights of international law. But one state cannot enjoy this right at the expense of another state, and, when it does, then intervention by the threatened state is justified on the ground of self-preservation. Thus, "if a government is too weak to prevent actual attacks upon a neighbor by its subjects, if it foments revolution abroad, or if it threatens hostilities which may be averted by its overthrow, a menaced state may adopt such measures as are necessary to obtain substantial guarantee for its own security" (8). The danger must be direct and immediate and of sufficient gravity to justify an appeal to war. Thus, when in 1804 it was discovered that Spain had engaged to assist France in her war against England, and was preparing a naval armament in the harbor of Ferrol, the British government vigorously objected, and, when their objections were disregarded, commenced hostilities (9). This seems to have been a case where the danger was direct and immediate, and of such magnitude

(7) 1 Oppenheim, 189-94.
(8) Hall, 279-80.
(9) Annual Register (1805), 20-27.

as to justify a resort to war. Where, however, the danger to the intervening state arises only as an indirect result of the existence of a form of government or the prevalence of certain ideals, then there is no direct, immediate danger, and intervention cannot be justified. To justify it under such conditions would be to hold that one form of state life would have the right to live and profit at the expense of another (10).

§ 16. **Intervention against wrong-doing.** Intervention in restraint of wrong-doing is either directed against acts that are illegal or acts that are only immoral. In the first case it would seem clear that intervention to prevent the infraction of the rules of law would not only be justifiable but necessary, as a condition to an effective system of international jurisprudence. Such intervention might well be classed as an intervention of right, rather than a mere justifiable intervention, for a state should be bound to submit peacefully to an intervention whose only purpose was the enforcement of law.

Intervention against immoral acts, such as oppression, religious persecution, governmental tyranny, etc, can only be justified on the ground that such acts are illegal in the eyes of international law. But there is nothing in the nature of international law and its fundamental doctrines that attempts to limit the manner in which each state shall deal with its own subjects. That is purely a domestic question. There is, however, a decided tendency to justify such intervention, and the time may come when international law will so provide, but certainly

(10) Hall, 280.

there has not yet been such a unanimity of practice and expression as to justify such an assertion. The interference of the United States in the affairs of Cuba on the ground of humanity is a recent example of such intervention (11).

§ 17. **Intervention to secure balance of power.** From the seventeenth century down to recent times, the idea of the balance of power between the various states of Europe was considered an undoubted maxim of European diplomacy, and, among the nations concerned, the practice of intervention to preserve the proportional share of power was never questioned until recent times. That such ground constitutes a justification for intervention today, while affirmed by some of the English writers (12), is a proposition that cannot be upheld. While adopted by the leading nations of Europe at one time or another, it has never received that unanimous approval of the civilized nations of the world necessary to make it a binding rule of law, and cannot be supported by the general principles of law, except so far as the balance of power is necessary to the self-preservation of any one state or states, in which case the intervention by the states so affected, would be justifiable upon grounds already mentioned.

§ 18. **Other causes of intervention.** It has sometimes been contended that when a number of states act in unison in intervening, the united character of the intervention makes it justifiable when otherwise it would be illegal. It is generally admitted that the action of a

(11) United States' Foreign Relations (1898), 760.
(12) 1 Oppenheim, 193-94.

number of states would probably be more just and wise than the action of a single state, but such a consideration could go no farther than to afford a moral justification. Legally a number of states could have no more right to interfere than a single state, and such is clearly the law. In the case of civil wars, the opinion that intervention in aid of the parent state is justifiable was once held by many writers, but has now generally been abandoned. It is easy to see that intervention in behalf of the revolting party is an interference in the independence of the parent state and is therefore unjustifiable. It is also clear that international law does recognize the existence of a de facto state in revolution, and grants it certain rights of belligerency when it has sufficient strength behind it to make its final existence a matter of uncertainty, and it ought to follow from this recognition that any interference with a de facto state is an interference with its legal belligerent rights and is therefore unlawful (13).

§ 19. **Distinction between law and policy as basis for intervention.** Care must be taken, in the study of the question of intervention, to distinguish between matters of law and matters of policy. The question of the balance of power is purely a matter of the foreign policy of certain states of Europe, and has already been pointed out as not being a rule of international law. So with the Monroe doctrine, which is nothing but a part of the foreign policy of the United States. As a matter of world politics, it is tremendously important, but it has no effect

(13) Hall, 287.

or significance in international law. If intervention is justifiable in upholding it, its justification would not be the Monroe doctrine, but would have to depend upon the fact that the self-preservation of the United States was dependent upon its immediate enforcement.

CHAPTER III.

TERRITORIAL DOMAIN AND JURISDICTION.

§ 20. **Jurisdiction.** Jurisdiction is the right of the state to exercise authority and control over persons, actions, and things. So far as the state exercises this right with regard to its own citizens and within its own territory, no question of international law is involved. It is only when there is a conflict between the jurisdictional claims of different states that there is a resort to the law of nations. For the purposes of our study the various phases of jurisdiction may be classified as territorial jurisdiction, dealing with the jurisdiction of the state within the limits of its territorial property; fluvial and maritime jurisdiction, concerning the exercise of this authority upon its territorial waters, its public and private boats when without its territorial limits, and upon the high seas; and jurisdiction over persons, which has to do with the state's control over its citizens when abroad and its treatment of foreign citizens at home.

Section 1. Territorial Jurisdiction.

§ 20a. **Territorial property.** "The territorial property of a state consists of all the land and water within that portion of the earth's surface which it claims by legal title, and, when it abuts upon the sea, together with a

certain margin of water" (1). The general theory is that within the limits of its territorial property the state has absolute and unqualified jurisdiction. Were this entirely true the problems arising out of the question of jurisdiction would be greatly simplified, but such is not the case. Experience has shown that international convenience is subserved by allowing each nation to retain a certain degree of its jurisdiction over its merchant vessels when in the territorial waters of another state, and that friendly relations are fostered and the idea of national sovereignty observed by removing public ships and diplomatic agents from the territorial jurisdiction of foreign nations. These are but typical examples of the limitations upon the general theory of jurisdiction over territorial property, and will be discussed later. We must first consider the question of how this territorial property may be acquired.

§ 21. **Acquisition of territory: Discovery and occupation.** Five modes of acquiring territory may be distinguished as follows: discovery and occupation, conquest, cession, prescription, and accretion. In the days of the discoveries it was generally held that the mere fact of discovery by the agents of the state gave a clear title to the territory. Later, actual occupation was held to be necessary to perfect the title of discovery, but it was not until the eighteenth century that effective occupation was insisted upon by the writers, and it was the nineteenth century before the practice of states conformed to such a rule. The fact of discovery is still of some importance, however. "It is agreed that discovery gives to

(1) Glenn. International Law, 45.

the state, in whose service it was made, an inchoate title; it 'acts as a temporary bar to occupation by another state' within such period as is reasonably sufficient for effectively occupying the discovered territory. If such period elapses, without any attempt by the discovering state to turn its inchoate title into a real title by occupation, such inchoate title perishes and any other state can now acquire territory by means of an effective occupation'' (2).

To make occupation legally effective it is necessary that the parties occupying have either the general or special authority of the state for which they are acting, and that the state by some formal act evidence its intention to acquire sovereignty over it, all of which must be supplemented within a reasonable time by the actual establishment of some governmental authority. The tendency still further to limit the right of acquisition by occupation is evidenced by the declaration of the Berlin Conference of 1885, which bound the signatory powers in the case of any further acquisition of territory in Africa ''to protect existing rights, and, as the case may be, freedom of trade and transit under the conditions agreed upon'' (3).

§ 22. **Same: Extent of territory acquired by discovery.** The question as to the extent of the territory secured through occupation is frequently a very difficult question. The United States commissioners, appointed to settle the Louisiana boundary dispute, held: ''When any European nation takes possession of any extent of seacoast, that

(2) 1 Oppenheim, 294.
(3) Hall, 113-115; Parl. Papers, Africa, No. 4, 1885.

possession is understood as extending into the interior country, to the sources of the rivers emptying themselves within that coast, to all their branches, and the country they cover, and to give it rights to the exclusion of all other nations to the same'' (4). Since, however, effective occupation and control are essential to complete the legal title, it would seem that only so much of the territory as has been reduced to the effective control of the acquiring state can be properly claimed, and, therefore, that the rule as stated by the commissioners is too broad.

§ 23. **Same: Conquest and cession.** Territory is acquired by conquest, where there is a long occupation of the territory with the intent to continue the possession for an indefinite period, and where there has not been a material, continued effort on the part of the opposing state to regain possession. Mere military occupation, even for a considerable length of time, is not sufficient. Title by conquest may also be confirmed by an act of cession or treaty of peace. The acquisition of the Philippines by the United States was a case of conquest confirmed by an act of cession. Acquisition of territory by cession is quite common. In such cases the validity of the title rests upon its recognition by the ceding state.

§ 24. **Same: Prescription.** ''Title by prescription arises out of a long continued possession, where no original source of proprietary right can be shown to exist, or where, possession in the first instance being wrongful, the legitimate proprietor has neglected to assert

(4) Scott, Cases on International Law, 74, note.

his rights, or has been unable to do so" (5). The object of prescription is to secure a stable international order by preventing the opening of old controversies over conditions which have long been acquiesced in and have become established facts in international relations. The length of time required for the acquisition of a title by prescription has never been determined, each case being decided upon its own merits. Thirty years has been suggested as the minimum, while fifty years has received the sanction of many writers. By prescription the titles to the portions of Poland have become valid in the hands of the states who were parties to the partition, though perhaps not valid by the original act (6).

§ 25. **Same: Accretion.** Title by accretion is a title by which the land formed by the action of the waters is held generally by the state having jurisdiction over the waters in question. The land formed by alluvium near the coast of a state belongs to that state. In the case of the Anna (7) it was held that certain mud islands, formed off the coast of the United States near the mouth of the Mississippi River, were a part of the United States, and that the territorial waters of the United States were to be reckoned from the islands and not from the mainland. Where a river is a boundary between states, the ownership of islands formed in a river will depend upon what portion of the river constitutes the boundary line (8)

(5) Hall, 119.

(6) Vattel, International Law, Book II, chap. 11; Rhode Island v. Massachusetts, 4 Howard, 639.

(7) 5 C. Robinson, 372.

(8) 1 Halleck, International Law, 182.

§ 26. **Boundaries of state territories.** The boundary lines of the territory of a state may be artificial or natural. That is, the boundary may be a line drawn between two given points, or along a certain parallel, or it may be described merely as following a given mountain range or a river. Such boundaries are more or less indefinite, and consequently certain rules for their interpretation have been adopted. When the boundary follows a mountain range, a line run along the water divide is generally adopted as the boundary.

§ 27. **River boundaries.** When a river is designated as the boundary, the general rule is, that, if the river is not navigable, a line drawn midway between the low water marks on either side is the dividing line. Where the river is navigable, a line drawn through the middle of the main or deepest channel forms the boundary. When, however, one state owned the territory on both sides of the river originally, and then granted the territory on the other side to another state, the boundary between the two states is not the middle of the channel, but is the low water mark on the side of the river occupied by the grantee, so that the whole bed belongs to the granting state. This was the rule adopted in the case of Handly's Lessee v. Anthony (9), in which case the question before the court was what part of the Ohio river formed the boundary between Indiana and Illinois. The land on both sides was originally owned by Virginia, which granted to Congress all her right in the territory "northwest of the river Ohio." In giving its opinion the court said:

(9) 5 Wheaton, 374.

"When, as in this case, one state is the original proprietor and grants the territory on one side only, it retains the river within its own domain, and the newly created state extends to the river only. The river, however, is its boundary." The same rule applies where a state has occupied the land on one side of a river, before occupation has taken place upon the opposite side by another state. In cases where the river changes, the general rule is, that, if the change is imperceptible, the boundary still follows the river, but when there is a sudden change the old line of boundary remains. In the case of Cooley v. Golden (10), the Missouri river, which was the common boundary between Missouri and Nebraska, suddenly changed its course leaving the old river bed dry, so that part of the land that was on the Nebraska side was now on the Missouri side. The court decided that the boundary line was still the middle of the old river bed, since the change was sudden and perceptible.

§ 28. **Lake and sea boundaries.** Where lakes or land locked seas form the boundary, unless there is a special treaty provision, or evidence of prior appropriation of the entire bed of the lake or sea, the boundary will be a line drawn through the middle of such lakes or seas. The same rule is true where narrow straits form the boundary of two states. Where the ocean is used as the boundary, the line will be drawn at least three miles out from the low water mark (11).

§ 29. **Qualified jurisdiction: Protectorates.** Besides

(10) 52 Mo. Appeals, 52.
(11) 1 Oppenheim, 257.

the general jurisdiction of a state within its territorial boundaries, there are two kinds of qualified territorial jurisdiction which are exercised by nations over territory which is not their own. These are found in the *protectorates* and the *spheres of influence.* A protectorate is a sort of international guardianship assumed over smaller states, either as a result of treaty provisions between the parties concerned, or merely as the unilateral act of the protecting states because of their commercial or political interest in the protected states. The degree of jurisdiction exercised varies widely in different cases. In general, it may be said that the protecting state assumes jurisdiction over all the foreign affairs, and thereby becomes answerable to other nations for all foreign obligations. The protecting state cannot be held responsible for the particular form of government adopted, but it must assume some jurisdiction over such internal affairs as may lead to international complications. It must see that a reasonable guaranty of safety to the lives and property of foreigners is afforded. The protectorate excludes foreign powers from interference, and, if wronged by the protected state, they must look to the protecting state for indemnity (12).

§ 30. **Same: Spheres of influence.** "The term 'spheres of influence' is applied to portions of territory lying within certain well-defined boundaries and occupied by uncivilized races, within each of which the influence of a particular European state is paramount. The practice of establishing spheres of influence, which is of very

(12) 1 Westlake, International Law, 119-27.

recent origin, amounts, in fact, to a distribution of uncivilized territory among the principal states of Europe by treaty defining the boundaries of the areas within which their influence shall be supreme'' (13). These treaties, which are generally made without the consent of the people of the distributed territory, bind no one except the parties to the treaty, although any attempt to interfere with the nation's sphere would be considered an unfriendly act. Some spheres are secured by agreement with the local tribes, but, since the state assumes no obligation to other nations for the protection of their citizens in such territories, and does not assume any jurisdiction over the territory, it has no legal right which other nations are bound to respect (14).

Section 2. Fluvial and Maritime Jurisdiction.

§ 31. Rivers. Fluvial and maritime jurisdiction extends to all the bodies of water within the territorial boundaries of the state; to all its ships, both public and private, when outside its territorial limits; and to its jurisdictional rights over the high seas. It has been from time to time asserted that a state's jurisdiction over the rivers within its boundaries is subject to the right of innocent passage or free navigation on the part of the nations of the world. The consensus of opinion, as well as the practice of the nations does not conform, however, to that assertion, but does conform to the general proposition that a state's jurisdiction over rivers or such parts of rivers as are within its boundaries is exclusive, and that

(13) Davis, Elements of International Law, 109.
(14) 1 Westlake, 128-32; 20 Revue de Droit Int. 5-35.

other nations have no right of navigation except by express consent. Where the boundary line between two states is the middle of a river, both states then have the right of navigation. Where rivers are international in their character and are navigable from the sea, there is a tendency to grant the right of navigation. The Vienna Congress of 1815 proclaimed free navigation upon the international rivers of Europe to all nations of the world. The peace treaty of Paris of 1856 expressly declared that the principle of the Vienna Congress, regarding free navigation upon the international rivers of Europe, was a part of "European public law" (15). In 1885 the final act of the West African Conference decreed that the Congo and the Niger should be opened to the navigation of all nations without exception (16). That such a principle is not yet the established law is made evident by the negotiation between the United States and England concerning the unsuccessful claim of the United States to the right to navigate the St. Lawrence river (17). Thus, the jurisdiction of a state over rivers or parts of rivers within its territory may be said to be exclusive, although there is a decided tendency to limit such jurisdiction by the right of free navigation, which is generally granted now as a mere matter of comity.

§ 32. **Entirely enclosed lakes and seas.** Such lakes and landlocked seas as are entirely enclosed by the land of one state are clearly a part of that state and subject

(15) 1 Oppenheim, 242.
(16) British State Papers, Africa, No. 4 (1885), p. 308-11.
(17) Treaties of United States, pp. 488, 1007, 1382-4.

to its exclusive jurisdiction. Where, however, the lake or sea is surrounded by the territory of several states there is some uncertainty, but the weight of authority and international practice indicate that they are parts of the surrounding territory. International lakes and land-locked seas are those where navigation to the open sea is possible. These are subject to the same jurisdiction as those just discussed, except there may be said to be a tendency towards free navigation of such bodies of water, based upon the analogy of the tendency in favor of free navigation in the case of international rivers (18).

§ 33. **Gulfs and bays.** Gulfs and bays, which are surrounded by the territory of one state and whose entrance is not over six miles in width, are everywhere admitted to be within the jurisdiction of that state, upon the accepted theory that the jurisdiction of a maritime state extends three miles at least into the bordering ocean. The present practice and opinion of writers, moreover, extends such jurisdiction to all such gulfs and bays whose entrances are narrow enough to be commanded by coast batteries on either or both sides of the entrance. The Institute of International Law has declared in favor of a twelve mile entrance, and recognizes jurisdiction over gulfs and bays with a wider entrance where the jurisdiction has been admitted for one hundred years (19). In the case of Stetson v. U. S. (20), it was held that Chesapeake Bay, which is about twelve miles wide at its mouth, and for a distance of 125 miles is eight miles or more wide, was not

(18) 1 Oppenheim, 245-48.
(19) Annuaire XIII, p. 329.
(20) 4 Moore's International Arbitration, 4333.

a part of the high seas but a part of the territorial waters of the United States. In the case of the Direct United States Cable Company v. Anglo-American Tel. Company, decided in the House of Lords (21) it was held that Conception Bay, which is 15 miles in width and 40 miles in length, was within the territory and jurisdiction of Newfoundland, since the bay was entirely within Newfoundland's territory and since the British dominion had been exercised over it for a long period of time.

In view of all these conditions it is difficult to determine just what the law is, but certainly it may be said that the restriction of six miles at the entrance is no longer law, and every case will have to be determined upon its own peculiar facts. However, it may be asserted that where the entrance is so wide that it cannot be commanded by coast batteries, or where the bay or gulf is surrounded by more than one state, they cannot be appropriated, and the jurisdiction of the states will extend only over the marginal seas.

§ 34. **Straits.** Where the territory on both sides of straits is owned by the same state, and where it is so narrow that it can be commanded by shore batteries it may be said to be within the jurisdiction of the state. Where the territory upon both sides is owned by different states, the middle of the main channel is the boundary line, and the jurisdiction of each state extends to its boundaries.

§ 35. **Canals.** In the case of canals within the territory of one state there would seem to be no reason why the rules regarding rivers would not apply. But in regard

(21) 2 Appeal Cases, 394.

to inter-oceanic canals, the tremendous importance attaching to them because of their bearing on the world's commerce and on naval affairs, has caused them to be a topic of much discussion among the powers, especially since the opening of the Suez canal in 1869. This finally culminated in the Convention of Constantinople of 1888, providing that the canal should be open to all the commerce and warships of the world and that the strictest rules of neutrality should be enforced (22). By the treaty between England and the United States in 1901, it was provided that the United States should construct the Panama canal and that it should have the right to regulate and police it; that the canal should be open to the vessels of war and commerce of the world upon equal terms; and that strict neutrality should be enforced (23). The question is such a recent one that no general rule of law can be asserted concerning it.

§ 36. **Marginal seas.** The marginal sea is that part of the sea bordering upon the territory of a state, over which that state has the right of jurisdiction. The width of marginal sea was originally conceded to be about three miles, as a result of the general adoption of Bynkershoek's rule that the jurisdiction of the state ends where effective use of arms ends. But since the end of the eighteenth century the range of guns has been greatly increased from time to time, and for this reason there is no uniform opinion as to what may be legally claimed as the marginal sea. According to the clear principle underly-

(22) Holland, Studies in International Law, 278.
(23) 1 Oppenheim, 251-54.

ing the rule, it would seem that the marginal seas should be extended to the length of a cannon shot and this has occasionally been done in individual cases, though there is no generally accepted practice to that effect. The Institute of International Law in 1894 unanimously declared that the width of marginal sea should be extended to six miles, and, for purposes of neutrality, to the extreme range of a cannon. The time certainly is not far distant when the width will be increased by common consent. The width is measured from the low water mark.

§ 37. **Nature of jurisdiction over territorial waters.** We shall now consider the nature and extent of the jurisdiction which a maritime state possesses over its territorial waters. We have already seen, in the case of rivers, landlocked lakes and seas, and possibly canals, that the jurisdiction of the maritime states is technically absolute and exclusive. But such is not the law with regard to the other territorial waters of the state. The jurisdiction over gulfs, bays straits, and marginal seas is not without its limitations. The riparian state has the authority to reserve all fishery rights within territorial seas for its own subjects; it undoubtedly has the right to prohibit all foreign vessels from engaging in coastwise trade and navigation, and it may also make and enforce all needful port regulations and maritime rules, which vessels must observe in its territorial waters. Its jurisdiction in matters of police regulation cannot be properly disputed. As to its jurisdiction over foreign merchantmen within its waters, there is a conflict in authority. One view is that when the ship drops anchor in territorial waters, it then

comes under the general jurisdiction of the riparian state, subject to certain qualifications. The other view is that ships in merely passing through the territorial waters of the state are subject to the absolute jurisdiction of the riparian state. The latter view seems to have received its chief support from England, while the great majority of the writers and the practice of most nations conform to the first view, which is well supported on considerations of general convenience. Over public ships of foreign powers the local state has no jurisdiction, save for the enforcement of necessary port and sanitary regulations.

§ 38. **Same: Right of innocent passage.** The jurisdiction of the riparian state is, however, subject to certain rights of innocent passage. Wherever the territorial waters are so located that passage over them is either necessary or convenient for the navigation of the open sea, as in the case of marginal waters, the ships of the world have the right of free passage over them. This rule is the result of the tremendous benefit to the merchant ships of the world, resulting from the free use of the ocean as a means of transportation. That warships enjoy the same right has been claimed and denied, though common practice favors the existence of the right. The law is uncertain on the matter and the authorities are in conflict.

§ 39. **Jurisdiction over vessels on high seas and in foreign ports.** A state has jurisdiction over its citizens and their property upon the high sea. The reason for this is obvious. It is important that all persons and property

upon the high sea be subjected to some authority, and it seems equally obvious that the state of their allegiance has first claim to such jurisdiction. The nationality of vessels and of persons, therefore, will determine what state shall have jurisdiction over them when outside of territorial waters. But when they enter a foreign port, they then enter the jurisdiction of the foreign state. But even here they are not entirely subject to the foreign jurisdiction, for it is a practice of most nations not to interfere in affairs concerning only those on board the ship and which do not disturb the peace and order of the port, leaving all such cases to the jurisdiction of the ship. England follows a contrary rule, but is clearly in the minority. The jurisdiction of the state over its ships on the high seas extends to all things and persons on such ships, and is exclusive except as to foreigners, where there is generally held to be concurrent jurisdiction between the nations involved (24). A state has absolute jurisdiction over its public vessels upon the high seas or in foreign ports or territorial waters, the exemption from the local laws of riparian states being due to the fact that such public vessels represent the sovereignty and independence of their states, and to considerations of mutual convenience.

§ 40. **Piracy.** Piracy has been defined as "every unauthorized act of violence against persons or goods committed on the open sea, either by a private vessel against another vessel, or by a mutinous crew or passengers

(24) Hall, 249-50.

against their own vessel" (25). The absence of authority of any state which may be held responsible for the action of its subjects is one of the requisites of piracy. Consequently, privateers, sent out by revolutionary organizations whose belligerency has been recognized, cannot be treated as pirates. When their belligerency has not been recognized, it is perhaps proper for the state against whom war is being waged to consider such expeditions piratical, but it is obviously not proper for other states so to treat them, since their purpose is political, and their hostilities are not directed against the commerce of other states. It is within the jurisdiction of every nation to punish piracy upon the high sea, and international law allows the punishment to be capital, although the municipal law of any state may prescribe a less severe penalty.

§ 41. **Fisheries.** For many years the question of appropriating the right of fisheries in the high seas has been disputed, and was finally denied in the seal fishing controversy between England and the United States. It may now be considered as well established that fishing in the open sea is free to all, and that each state possesses the exclusive rights to the fisheries within its territorial waters (26). Jurisdiction over the high seas has been exercised by some states by extending the regulations regarding revenue and sanitary laws beyond the three mile limit. The right, however, has been frequently denied

(25) 1 Oppenheim, 341.

(26) Proceedings of First Seal Arbitration, 1893.

by writers and was denied by the United States Supreme Court in the case of Rose v. Himely (27).

Section 3. Personal Jurisdiction.

§ 42. **Nationality by birth.** The question of one's citizenship or nationality is primarily a question of municipal law. It involves the question of allegiance and protection between the person and the state. International law is mainly concerned in the matter of nationality in cases where the question of protecting citizens in foreign countries is raised. It is a fixed rule in international law that a state cannot impose its nationality upon a person that is clearly a subject of another state, and cannot, therefore, in such a case demand the right of protecting him nor compel him to render the duties of citizenship. The difficulties of the question arise from the conflict of laws among the nations as to who are their citizens, that being a question which each state has a right to determine, subject to the restrictions above mentioned. The laws of practically every state provide that children born in the state, of which their parents are citizens, are citizens of that state. It is the question of foreign born children that gives difficulty. Most states follow the rule of the jus sanguinis, which is to the effect that children born abroad should receive the nationality of their parents. Most states following this rule, however, make the provision that children of foreign parents born within their territory, shall, upon attaining their majority, have the right to elect their allegiance

(27) 4 Cranch, 241.

within the year. Other countries follow the jus soli, maintaining that the place of birth determines the citizenship of the child. The United States and England have provisions based upon both the jus sanguinis and the jus soli. A child born of Swiss parents in the United States would be a Swiss subject under the Swiss laws, and a subject of the United States under their laws, which is only one example of the many conflicts which occur in the laws governing nationality. A person may acquire citizenship in the United States by being born on American soil, or of American parentage abroad, or by being an inhabitant of territory which is made a part of the United States, or by complying with the naturalization laws of the country.

§ 43. **Expatriation.** Most of the international conflicts that have arisen concerning citizenship resulted from the denial of the right of expatriation. This was one of the chief causes of our war of 1812. England insisted that her subjects could not sever their allegiance from her without her consent, and therefore the fact of their naturalization in the United States did not remove them from their allegiance and duty to the British government, and she insisted upon the right to search American ships and impress into the British service naturalized American citizens. Similar questions have arisen in connection with the subjects of Germany becoming naturalized in the United States, and, upon returning to their native land, being compelled to render military service. The United States contended at the time and has since made treaties to the same effect, that

when such citizens return to their native land they could be held for any liability or military duty which accrued before the date of the emigration, but not for any that accrued after such date (28). Similar treaties have been made between other nations. England by the naturalization act of 1870 granted the right of expatriation, and recognized the naturalization of her subjects abroad. There is no rule of law by which these conflicts can be adjusted. For the future as in the past, they will have to be solved as questions of international comity and conventional right.

§ 44. **Status of aliens who have declared intention of expatriation.** It is generally held that the right to protect a citizen does not accrue until the citizenship of the person is completed. In the case of Martin Kostza, a foreigner domiciled in the United States who had declared his intention to become a citizen there, the United States demanded the right of protecting him on the ground that domicile confers a national character, although he was not a citizen by the laws of the United States. This attitude has been criticized since he was not yet a citizen, and therefore they had no right to protect him against another country. So long as the claim is made against a third state, however, and not against the state of his nativity, it would seem unobjectionable. The declaration to become a citizen, if accompanied with the enjoyment of some of the privileges of citizenship does, however, confer upon such citizens certain duties of citizenship. Thus, during the American Civil war, the United

(28) Treaties of the U. S., 43.
(29) Wilson on International Law, 140-43.

States exacted military service of such persons, giving to the persons the option of rendering the service or of giving up the enjoyment of their privileges and leaving the country. England conceded the right of the United States to exact such service (30). A state's jurisdiction may be extended to its citizens abroad, but it cannot enforce such jurisdiction within the territory of another state. It must await the return of the citizen to its own territory to inflict any punishment or enforce its decree.

§ 45. **Jurisdiction over aliens.** Aliens, like all other persons within the territory of a state, are bound to obey the laws of the land and are subject to its civil and criminal jurisdiction. The state may require aliens to render such military service as may be necessary to ward off an immediate or sudden danger, as repelling an invasion or quieting a mob, but it cannot compel them to enter the regular military service, or to render service in general wars. The rights of aliens to enjoy such privileges as the holding of property, freedom of speech and worship, etc., are subject to the local laws. While a civilized state would never attempt to maintain the right of absolute exclusion of aliens, yet such would seem to be within their strict legal rights. The right of expulsion and conditional admission is generally admitted and maintained (31).

§ 46. **Foreign sovereigns.** The sovereign of a country, when traveling in another state, has almost complete immunity from the local jurisdiction of the state. While

(30) Hall, 241.
(31) Wilson and Tucker, 139.

this custom originated in acts of international courtesy and in the theory that no sovereign may exercise authority over another, it is maintained as a rule of international law today because of its mutual convenience to the several states. To interfere with the sovereign would doubtless be to interfere with the administration of state affairs. His exemption extends to all members of his suite. He is exempt from a payment of taxes and the performance of duties, or from any police or administrative regulations of the local state. While his house cannot be entered by state authorities, he is, nevertheless, prohibited from granting the right of asylum to criminals not members of his suite, and, should he do so, his expulsion from the country might properly follow. The sovereign cannot perform acts of governmental sovereignty within the local state, nor even try members of his own suite for offenses committed within his house. Only minor acts of personal sovereignty are allowed. He and his suite are bound to commit no acts against the safety and good order of the community, but, should they do so, they could only be expelled from the country or subjected to such confinement as would be necessary in self-defense. They could not be tried or punished by the local state.

§ 47. **Diplomatic agents.** Diplomatic agents are granted immunity from both the criminal and civil jurisdictions of the states to which they are duly accredited. Originally this immunity was granted because of the dignity of the office, the agent being supposed to represent the sovereignty of his state. The same immunities granted to his sovereign were accorded to the agent. To-

day, however, the immunity of agents is placed upon the basis of necessary convenience, since his subjection to local jurisdictions might interfere with official duties, or make him dependent upon the good will of the local government or its officers. Because of this and for the further reason that the immunity of agents has been a subject of continual adjudication, while but few cases concerning the immunity of sovereigns have ever arisen, the law concerning diplomatic immunity is better developed and doubtless more limited than the immunity of the sovereign. The exemption from criminal jurisdiction means that the agent cannot be arrested or tried for crime, but does not mean that he is at liberty to violate the law with impunity, for he is under an undoubted duty to obey the local laws. If he does not, complaint must be made to his home government as the only means of redress; except in serious offenses and especially those directed against the state, where he may be placed in restraint if necessary to prevent further violation, and, in some cases, expelled from the country without waiting for his recall. He can never be imprisoned as a punitive measure, however, nor can he be tried or punished by the local authorities (32). In the case of Prince Cellamare (33), the Spanish ambassador at Paris, he was arrested and conducted across the frontier for participating in the conspiracy to place Philip V at the head of France. Gyllenorg's Case (34), held that an ambassador, who conspired to overthrow the government to which he had

(32) Mendoza's Case, 2 Ward's Law of Nations, 522.
(33) 1 Martens, Causes Celebres, 282.
(34) 2 Ward's Laws of Nations, 548.

been accredited, may be arrested and his papers seized. The propriety of seizing a diplomat's papers has been seriously questioned, unless it be for the mere purpose of turning them over to the agent's government.

§ 48. **Same (continued).** The same rules governing the sovereign in regard to the immunity of his house and the right of asylum apply to the residence of the diplomat. The agent also enjoys civil immunity. He cannot be sued, compelled to testify, or perform other civil duties which might interfere with his official position, nor is he subject to direct taxation. He is, however, subject to such sanitary and police regulations as are necessary to the safety and health of the community. The agent may voluntarily surrender himself to the civil jurisdiction of the state for one purpose or another, and this is sometimes done. All these immunities extend to the agent and to the members of his suite, from the time he enters the country with his credentials until a reasonable time after the termination of his mission. Similar immunity is granted to him by third states, through which he passes on his way to and fro, for a reasonable time in which to make the journey.

§ 49. **Foreign armed forces.** When military forces cross the territory of another state, it is generally done under treaty stipulations, since the right of passage of such forces is now generally denied except as a treaty right. In such treaties, the time and route of passage is generally prescribed. However, nothing ordinarily is said of the right of jurisdiction over the passing troops, and, in the absence of any provisions to the contrary, com-

plete immunity over the troops is implied. It is necessary and essential that the jurisdiction of the invading army over its own troops should be exclusive, for, to allow the exercise of foreign jurisdiction over them, would be incompatible with the efficiency and discipline of the army. The commander might as a matter of concession turn over any offenders against the citizens of the invaded state, but there should be no right to demand the relinquishment of such jurisdiction except perhaps in the most aggravated cases. Relief should be sought through diplomatic channels.

§ 50. **Public ships.** The public vessels of a state in the territorial waters of another nation are exempt from its territorial jurisdiction. In the case of Exchange v. McFadden (35), the court declared that a suit against a French public vessel could not be maintained in the courts of the United States, regardless of the merits of the controversy, since such would be inconsistent with the common interest of sovereigns which impel them to mutual intercourse and the interchange of good offices. The crew and other persons on board such ships, however, are bound by the laws of the port, except in regard to such things as begin and end upon the boat, or concern only its internal affairs; but, when persons within the ship violate the laws of the port, or commit crimes and do other acts which take effect outside of the boat, the local state has no right to interfere with the vessel or the people upon it, but must look for redress to the government to whom the vessel belongs, except in cases of great stress where

(35) 7 Cranch, 116.

the right of self-defense may justify the forceful expulsion of the ship from territorial waters. Administrative rules of the port, such as quarantine regulations, must be respected, except where there is a well-established custom to the contrary which forms the exception. If the persons on the boat or the members of the crew go outside of the boat or its tenders, they are then completely subject to the jurisdiction of the local state. The captain is not individually exempt when off the boat, except in regard to acts done in his official capacity. While asylum may be granted to political offenders if they ask for it, it is illegal to grant protection to criminal refugees, and they should be delivered over to the authorities of the port.

§ 51. **Merchant vessels.** Merchant vessels in territorial waters of another state by strict legal theory are subject entirely to the jurisdiction of that state, though there is a general tendency to follow what is known as the French rule, which is, that the local government will not take jurisdiction over foreign merchant vessels in her ports, except where the peace and dignity of the government or the tranquillity of the port should be involved. This rule has been adopted by many states by treaty, and conforms to the opinion of most writers and the prevalent practice among the states, England excepted. In the Wildenhus Case (36) the Supreme Court of the United States held that where a mere quarrel or fight in the boat between seamen would not be sufficient to give the local state jurisdiction under the French rule, yet a murder committed upon the boat would so affect the tranquillity

(36) 120 U. S. 1.

of the port as to justify the exercise of local jurisdiction. However, there is no immunity on board a merchant vessel, and it may be boarded for the purpose of enforcing the law or capturing criminal or political refugees.

§ 52. **Consular jurisdiction.** In countries not yet fully admitted to the family of nations and where the standards of law and morals are widely different from those of fully civilized nations, as in China and Egypt, it is usual for states to establish what are known as consular courts, having jurisdiction over all cases within that country to which one of their citizens may be a party, except where the other party is also a citizen of a fully sovereign state, in which case the matter of jurisdiction between them is determined by treaty. These courts are presided over by consuls, who, in such cases, are invested with special judicial powers. They are generally established by treaty relations. Appeals lie to the diplomatic officers and to the courts of the various states.

§ 53. **Extradition.** It has been urged from time to time that international law makes it the duty of states to surrender to foreign nations individuals within their jurisdiction, who have been accused of criminal offenses within the territory of the foreign state. The great weight of authority and practice is against such contention, however; and, in its place, most nations have adopted treaty stipulations providing for extradition. These treaties generally provide in detail what offenses may be made the basis of extradition proceedings, regulate the mode of procedure, and some treaties provide expressly that parties extradited cannot be tried for any

other offense than the one for which they were extradited, until the lapse of a reasonable time after the trial. This rule has been adopted by the United States regardless of treaty stipulations (37).

§ 54. **Same: Political offences.** Most treaties make an exception of political offenders, and one of the most vexing questions raised in regard to extradition is the determination of what is a political as distinguished from a criminal offense. Where a person, belonging to a revolt which had attained the dimensions of a war carried on for political purposes, killed a man as an incident in the revolt and with a bona fide intent of furthering its political ends, it was held to be a political and not a criminal offense, and therefore that he could not be extradited (38). Perhaps no better definition can be found than the one suggested by Lawrence, that political offenses are "acts done for political objects which would be allowed by the laws of war, were the relation of belligerency established between the doers of them and the states against which they are done" (39).

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(37) U. S. v. Rauscher, 119 U. S. 407.
(38) In re Castioni [1891], 1 Q. B. 149.
(39) Lawrence, 262-67.

CHAPTER IV.

RELATIONS BETWEEN STATES IN PEACE.

Section 1. Diplomatic Relations.

§ 55. Diplomatic agents and their functions. The political relations between states are generally carried on through diplomatic agents, acting under the authority of that branch of the government which by its local constitution is intrusted with the management of foreign affairs. In the United States the control of foreign relations is delegated to the executive department of the government, the department of state corresponding to the department of foreign affairs generally found in other nations. Among the duties of the diplomatic agent are the furnishing of his state with all information concerning matters of international interest regarding the state to which he is accredited, and the protection of the interests of his fellow citizens while in that state. In order to attend to his duties most effectively, he is bound by every consideration of honor and duty scrupulously to abstain from all interference in the internal affairs of the local state.

§ 56. Diplomatic ceremonial. Diplomatic ceremonial is very elaborate and complex, especially in European countries, and a breach of any of its long standing tradi-

tions might be considered an insult to the dignity of the power concerned. To help simplify matters, and with the idea of fixing a definite course of procedure which a state may follow without giving offense to anyone, the Congress of Vienna, in 1815, adopted a classification of public ministers, who rank in the following order: ambassadors, legates, and nuncios; envoys extraordinary and ministers plenipotentiary, or other persons accredited to sovereigns; ministers resident; charges d'affaires. The classification is of little importance except for ceremonial purposes. The title which the agent of a state bears depends upon municipal law entirely, the custom being for each nation to give the same title to its agent as is held by the agent it receives (1)

§ 57. **Acceptance of diplomatic agents.** The conduct of international relations being entirely necessary for those states living within the pale of international law, there is said to be a legal obligation resting upon nations to receive the diplomatic representatives from foreign countries. But this duty does not extend to compel the reception of permanent envoys, and there are exceptions to the duty to receive special or temporary agents. Permanent envoys not being necessary to inter-state relations, they are not required by law. Temporary agents, on the other hand, are necessary from time to time, and their reception by the state is therefore a matter of legal duty, with certain exceptions. Where the sovereignty of the state sending the agent is doubtful, as in the case of civil war when both factions claim the sovereignty, and where

(1) Opinions of Att. Gen. 74.

therefore a reception of the agent would amount to the recognition of his faction, the state may properly decline. The same has been held where the agent represents claims, which the receiving state does not regard as compatible with its dignity or interests to consider.

§ 58. **Refusal to accept particular individuals as agents.** But the refusal to receive an *agent* must not be confused with the refusal to receive a particular *individual* as the agent of any state. When the individual assigned as the agent to another nation is found to hold views contrary to those in effect in the established regime, that individual may properly be refused acceptance. Thus Mr. Keily, the United States minister to Italy, was refused by that country, because in 1871 he had protested against the annexation of the Papal States. However, when the ground of the objection is trivial, it is generally held that the sending state does not have to acquiesce in the rejection. When Austria refused Mr. Keily on the ground that his wife was a Jewess, President Cleveland declined to cancel the appointment, and consequently affairs were left for some time in the hands of the secretary of the legation (2). It may be laid down as a general rule that a state may refuse to accept a particular individual as the agent of a foreign country, whenever there is any reasonable or substantial ground why he should be personally objectionable to the sovereign of the state. It is customary, therefore, for a state to make secret inquiries concerning the acceptability of the individual to be appointed as its agent (3).

(2) Wharton's Digest, 601.
(3) Bluntschli, sec. 168.

§ 59. **Commencement of diplomatic missions.** The permanent mission of a diplomatic agent begins when proper credentials have been presented to and received by the accrediting government. A temporary mission commences with the presentation and acceptance of the proper credentials by the agents of the other governments whom he is intended to meet. The credentials of the agent consist of "letters of credence" and "full powers". The letter of credence gives the name of the bearer and his rank, and bespeaks credit for communications made by him in the name of his government. When the mission of the agent is special or temporary, or where a permanent agent is entrusted with authority to negotiate for his government, he must be furnished with "full powers" of negotiation, which may be contained in his letter of credence or conferred separately by letters patent, describing the nature and scope of his authority.

§ 60. **Termination of diplomatic missions.** "The mission of a diplomatic agent is terminated by his recall, by his dismissal by the government to which he is accredited, by his departure on his own account upon a cause of complaint stated, by war or by the interruption of amicable relations between the country to which he is accredited and his own, by the expiration of his letter of credence if it be given for a specific time, by the fulfilment of the specific object for which he may have been accredited, and, in the case of monarchial countries, by the death of the sovereign who has accredited him" (4)

§ 61. **Grounds for dismissing envoys.** The right of a

(4) Hall, 297.

a state to dismiss envoys accredited to it or to demand their recall from the sending state is much disputed. As a matter of courtesy, a nation should not dismiss an agent except upon serious grounds, and, where it does so, assigning reasons which are fraudulent or trivial, it may well be taken as a covert insult to the sending nation. A country need not recall its agent, therefore, unless it is satisfied that the "reasons alleged are of sufficient gravity in themselves." Offensive conduct towards the state or interference in its internal affairs would seem to be a sufficient justification for dismissing an agent or demanding his recall. The United States, however, will recall its representatives upon less serious grounds, and has demanded the same from other states, altho its attitude has been severely criticized. In 1871 the recall of the Russian minister to the United States was demanded on the grounds of undesirable personal conduct, the matter being finally compromised by postponing the recall (5). When in 1848 the British minister to Spain was dismissed, after the refusal of the British government to recall him upon being charged with being opposed to the party in power, England retaliated by dismissing the Spanish minister, Spain having made no serious attempt to justify her action (6). The conclusion to be drawn from these and similar cases is that the dismissal of an agent or a demand for his recall, if not justified by evidence of a serious offense, is at least an unfriendly if not an illegal act (7).

(5) 1 Wharton's Digest, 84.
(6) State Papers, 1848.
(7) Hall, 298-300.

§ 62. **Immunity of diplomatic agents.** This is discussed in §§ 47-48, above, to which the reader is referred.

§ 63. **Consular agents.** Consuls are persons appointed by a state to reside in a foreign country, with the permission of the latter, for the purpose of looking after the interests of the appointing state, especially interests of a commercial nature. The general classification of consuls includes consuls-general, consuls, vice consuls, and consular agents. Their more important duties are to look after the commercial interests of the country they represent; to see that laws and treaties with reference to the subjects and commerce of their state are properly carried out; to exercise notarial functions for subjects of their country, as in the authentication of births, deaths, etc.; and to exercise disciplinary jurisdiction over crews of the vessels of their own states, though not to the exclusion of the local jurisdiction. The appointment to the office of consul is by commission or patent, which is communicated to the government to which the agent has been assigned. If acceptable to the receiving state, an exequatur will be issued giving him the authority to perform the duties of his office and guaranteeing to him the rights belonging to the office. The sending of a consul to a belligerent state does not involve a recognition of that state. The matter of consular courts in certain countries has already been discussed (§ 52, above).

§ 64. **Same: Immunity.** Consuls are municipal and not international officers, except in a very limited sense. They are not therefore entitled to the immunity of diplomatic agents, but, being the representatives of a state

and being received by the consent of the state to which they are assigned, international law does allow them such protection and immunity as is absolutely necessary to the performance of their duties, including the inviolability of the papers and archives of the consulate, and exemption from arrest for political purposes. It is perfectly clear, however, that the consular agent is subject to the general civil and criminal jurisdiction of the local state (8). For illegal and improper conduct, a consul may be punished or sent from the country, and his exequatur revoked at the option of the offended country (9).

Section 2. Treaties.

§ 65. Nature and classification of treaties. Treaties may be defined as agreements between states by which existing duties and obligations are modified or defined, or new duties and obligations created. Agreements between a state and a private individual, or between a state and the church, or agreements by sovereigns or sovereign dynasties pertaining to their individual or dynastic claims to the sovereignty of a state, are not considered treaties, since the relations established by them are not international in their character. The right of making treaties is one of the essential attributes of sovereignty, and, where the right does not exist, or exists only in a limited degree, as in the case of the German Confederation, to just that extent the sovereignty is impaired. Treaties as defined above are called *treaties* or *conventions*. These terms are many times used interchangeably, though the

(8) Clark v. Crestica, 1 Taunt. 106.
(9) Coppell v. Hall, 7 Wall. 542.

latter term should only be applied to agreements which become executed upon their fulfillment, the effects alone being permanent, as boundary conventions, agreements of cession, etc., as distinguished from agreements which regulate the future obligations and actions of the contracting parties. There are several forms of qualified treaties which should be defined. *Cartels* are agreements made between belligerents, generally regulating mutual intercourse during war, such as arrangements for exchange of prisoners, or for special telegraph or postal communication and similar objects. Such agreements are made by the ranking commander of the military forces, and do not require ratification. Of a similar nature are agreements for the cessation of hostilities for a period of time, which are known as *armistices* or *truces,* and the agreements determining the terms upon which a besieged place will surrender, known as *capitulations.* Such agreements are only valid when the officers have not exceeded their powers.

§ 66. **Negotiation and ratification.** The treaty-making power of a state is generally vested in its ruler (10), though in the making of treaties, he rarely acts in person but authorizes agents to act for him. These agents receive written commissions known as "full powers," which authorize them to negotiate for their state. In addition to this they generally receive specific instructions from their government, often given in secrecy. These agents, acting under the authority given them by their respective states, draw up the treaty and affix their signatures, but

(10) U. S. Cons., Art. II, sec. 2.

such action does not conclude the treaty finally, for all treaties, except those negotiated by the sovereigns themselves and such qualified treaties as cartels or capitulations, are not binding until they receive the tacit or express ratification of the treaty-making power. The older writers contended that ratification was not necessary, unless the agents of the state had exceeded the scope of their authority. But the magnitude and importance of the interests involved in a treaty are such as have led to the adoption of the rule, that a state cannot be legally bound by an agreement, though made by its authorized agents, unless the sovereign power has given his tacit or express approval. In fact, most modern treaties make the provision that the treaty shall not take effect until ratified by the treaty making power. Nor is it a legal duty of a state to ratify the acts of its authorized agents, though considerations of good faith might require it (11). Where the ratification is partially a legislative act, as in the United States, it is generally conceded that there is no obligation whatever to ratify, since the ratifying body has had nothing to do with the instructions and authority given to the negotiators (12). Upon its ratification the treaty takes effect from the date of the signing, unless special provision is made for some particular date.

§ 67. **Validity of treaties.** The first condition essential to the validity of a treaty is that the parties interested must have the international capacity to contract. They must be completely independent states, or at least have

(11) 1 Oppenheim, 556.
(12) Hall, 325.

complete sovereignty in regard to those things which compose the subject matter of the treaty. It is generally stated that the agents negotiating the treaty must have the full power to act, but, since it is the ratification by the sovereign power which makes the treaty binding, the prior authority of the agent is not material. The free consent of the contracting parties is generally held to be necessary to the validity of a treaty. This applies to the agent of the state rather than to the state itself. If the persons invested with the right of ratification should ratify under personal threats, compulsion, or when in an intoxicated condition, so that there would be an absence of the element of consent, the treaty would be invalid. This does not mean, however, that a treaty is invalid because the state is forced to give unfavorable terms by means of military conquest. It has been contended, however, that where a state is thus forced into a treaty to give up its independence, the presumption is that the state could never freely have consented to such a treaty and therefore it is void. This doctrine is laid down by the leading writers upon the subject (14). Finally, treaties are void when the object is physically impossible, immoral, or illegal.

§ 68. **Implied conditions in treaties.** A treaty becomes voidable so as to release a state if it so chooses, when anything that formed an implied condition of the treaty is substantially altered. Thus, there is an implied condition that both parties will abide by the provisions, and where one party fails to do so in any material way,

(14) Davis, Elements of International Law, 227-9.

the other state is no longer bound. It is also implied that a state never entered into any agreement, the performance of which would cause the sacrifice of its existence. Therefore, a state could not be expected to carry out its treaty of guarantee for instance, if so doing would mean suicide. Freedom of action or independence is another implied condition often suggested, and therefore, when a state bound by treaty loses its freedom in respect to those things which form the subject matter of the treaty it is no longer bound. When the ratification of the treaty is secured through fraud, as when false maps are used in the location of boundary lines, the defrauded state cannot be bound against its will (15).

§ 69. **Interpretation.** Treaties should be interpreted according to equitable rules, in an effort to arrive at the spirit rather than the letter of the agreement and to give effect to the common intentions of the contracting parties. Many times ambiguities arise, and in such cases there are a few rules that have found general acceptance. Where words have special meanings when adopted in treaties, such meanings should be adopted. No construction, however, should be adopted which leads to an absurdity or to incompatibility with principles of law. Where the terms have different meanings in different states, the meaning generally accepted in the state where the performance is to take place should control. In cases where a plain meaning is wanting, the spirit of the whole instrument should govern, reasonable constructions being adopted in preference to merely literal inter-

(15) Hall, 343-53.

pretations. A treaty cannot be so construed as to deprive a state of any of its fundamental rights, except where they are expressly the subject of the agreement. Where rights are clearly granted by a treaty, all that is necessary to secure them is implied in the instrument.

§ 70. **Same: Conflicts with other treaties.** Where the ambiguity results from a conflict between provisions of the same treaties or between different treaties, a special provision will always take precedence over a general provision, even though an exception is made to a general imperative clause. In other conflicting provisions, the one having the greatest penalty attached, or the one stated with most precision, or the one of the most importance will prevail. Where two treaties, made between the same states at different times conflict, the latter one will prevail, since it will be held to have repealed the former. Where, however, the second is made by an inferior authority, the first will prevail, as where a general surrenders on terms contrary to the provisions of a treaty already negotiated between their governments. Where two treaties conflict which are made with different states, it is obvious that the first will prevail, for it would be imposible for a third state thus to interfere with existing treaty rights of another state, without its consent (16).

§ 71. **Same: Conflicts with laws.** Where an act of the Congress of the United States conflicts with a prior treaty provision, the courts will give preference to the act of Congress, for it is not for the courts to interfere if the government sees fit to ignore the

(16) Hall, 332-34.

treaties into which it has entered (17). Where a treaty conflicts with a statute of one of the states, the treaty will be given preference (18). Where a state covenants to give to another nation the privileges granted to the "most favored nation", it refers only to those privileges which are granted *gratuitously* to the most favored nation, and not those which are granted on the condition of a reciprocal privilege (19).

§ 72. **Extinction and renewal.** All treaties are extinguished when the end for which they are negotiated is accomplished, when the period of time for which they are adopted is completed, or when all parties to the agreement consent to its termination (20). When the continuance of the agreement is based upon terms which do not exist, as where the right to navigate a river is given, but the river ceases to be navigable, the agreement ends. When performance becomes physically impossible or illegal, or where a voidable treaty is repudiated by the injured state, the treaty relations are extinguished (21).

§ 73. **Same: Effect of war.** The existence of war may either abrogate or suspend treaty relations between the belligerents, or it may leave them unaffected. Treaties of a political character, negotiated with the idea of setting up a permanent condition of things, such as boundary treaties, or treaties modifying the rules of war or made in contemplation of war, will not be abrogated by

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(17) Botiller v. Dominguez, 130 U. S. 238.
(18) Wunderle v. Wunderle, 144 Ill. 40.
(19) Whitney v. Robertson, 124 U. S. 190.
(20) Treaties and Conventions of U. S., 461, 472, 474.
(21) Davis, Elements of Inter. Law, 236-9.

the existence of war (22). Where treaties are evidently intended to set up a permanent arrangement in regard to such matters as the loss and acquisition of nationality, the general rule seems to be that such treaties are suspended, and will revive with the cessation of hostile relations. Treaties which involve continuous acts and which are not expected or intended to be permanent, such as commercial or postal treaties would probably be abrogated by the war, though, if there seemed to be present the intention to make the provisions permanent, such treaties might be held to be suspended only by war, and to revive at the close of war. Where third states are parties to the treaty, war affects only those parts of the treaty which become impossible of performance because of the hostile relations. In all cases where war is waged over the subject matter of the treaty, the treaty is abrogated.

Section 3. Pacific Settlement of Disputes.

§ 74. In general. That the settlement of international disputes by war should be regarded as a last resort is a proposition that now meets with unanimous assent. Amicable settlements of disputes may be secured through diplomatic negotiations, through the good offices or friendly mediation of third states, or by submitting the controversy to the decision of congresses and conferences, or to a court of arbitration. Diplomatic negotiation is carried on in the same manner as other diplomatic business, whether committed to regular or special agents, and has for its purpose the friendly adjustment of conflicting

(22) Sutton v. Sutton, 1 R. & M. 663.

claims. "Good offices" and mediation consist in the offer by a friendly power of its assistance in inaugurating negotiations looking to the peaceful settlement of the conflict, and in the conduct of such negotiations. The settlement of disputes by conferences and congresses, generally composed of the representative of the interested states and occasionally of friendly states also, has been of common occurrence in the past.

§ 75. **International arbitration.** The decision of disputes by international arbitration is a question of rapidly increasing importance, especially in view of the growing agitation for international peace. It is a mode of settling disputes between two or more states by submitting the controversy to the ultimate decision of third parties. This is done by a form of treaty, which provides for the appointment of the arbitrators, rules of procedure, and all other matters necessary to the arbitration. The award of the arbitrators is as binding upon the parties to it as any treaty obligation, and the United States courts have held that the finding of a court of arbitration will be given the same effect in the courts as a regular treaty (23). The award may be avoided when the tribunal has clearly exceeded its powers as conferred by the treaty of arbitration, when the decision is an open denial of justice, when the award has been secured through fraud or corruption, and when the terms of the finding are equivocal (24).

§ 76. **The Hague Conference.** With a view to encourag-

(23) La Nenfa, 75 Fed. 513.
(24) Glenn, International Law, 156.

ing the settlement of disputes by arbitration, the Peace Conference at the Hague in 1899, provided for a Permanent Court of Arbitration, which is to be composed of persons chosen by the parties to the dispute from a permanent list of judges, nominated by the signatory powers. The "compromise" or preliminary agreement sets forth the precise question which is to be referred for determination, and defines the character and powers conferred upon the tribunal. There is an established procedure, which, however, may be regulated or changed by the terms of the preliminary agreement (25).

§ 77. Means of compulsion short of war: Retorsion. Between the peaceful methods of adjusting disputes just considered and the resort to war, there are certain remedies of a serious nature to which a nation is justified in resorting, on the assumption that it is the only remedy short of war. Such means are only justifiable when a nation is guilty of wrongful acts and refuses to discontinue such acts or make reparation for those already done. These measures of redress may be classified under two heads, retorsion and reprisals. *Retorsion* is retaliation in kind. When one state refuses to grant certain rights to the citizens of another state, that state resorts to retorsion when it in turn refuses the same rights to the citizens of the offending country. Retorsions generally do not apply to serious breaches of international law, but only to unfriendly acts or violations of international comity.

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(25) Hague Convention for the Pacific Settlement of International Disputes, 1907.

§ 78. **Same: Reprisals.** *Reprisals* consist in the forcible seizure by a state and confiscation or detention of the property of the offending state, or the capture or mistreatment of its citizens, but are only justified when that state has violated some legal right and not mere matters of comity. At the present time they are rarely resorted to, except by a strong nation against a weaker one, with the object of obtaining redress without recourse to war (26). One of the most common forms of reprisals is the *embargo,* prohibiting the ships of the offending nation from leaving the ports of the other, which amounts to the sequestration of their vessels. If the dispute is satisfactorily adjusted the boats are released, but if war results they may be confiscated (27); or, if sequestration is not sufficient to secure an adjustment of the dispute, confiscation is justified. This is on the theory that the only other recourse is war, and therefore it follows that any act, less than war, is legitimate if necessary for the peaceful enforcement of such claims.

§ 79. **Same: Pacific blockade.** Another and more recent form of reprisals is resort to *pacific blockade,* which means that the ports of the offending nation will be blockaded against their own vessels. This too is employed for the purpose of securing redress against acts, which in former times would have justified hostilities amounting to war. They have generally been resorted to by stronger nations against weaker ones with the idea of forcing reparation by peaceful means, and the law seems clearly

(26) 1 Halleck, 505-8.
(27) Boedes Lust, 5 Rob. 246.

established that they can only be enforced against the vessels of the offending state, and not against neutrals (28). To determine the nationality of neutrals however, the "right of approach" may be exercised.

(28) Annaire 1887, p. 279; Parl. Papers, Greece, No. 4, 1886.

CHAPTER V.

WAR

§ 80. **In general.** War is a contest carried on by armed public forces between states, or between a state and a community whose rights of belligerency have been duly recognized. Peace being the normal condition between the states recognized in the family of nations, this relation should not be disturbed, except where redress or relief is sought from past or impending violations of international law. Contests for conquest and plunder are therefore unjustifiable, although the objects of war are not limited to the causes of the conflict, and circumstances may so change as to justify the triumphant state in demanding more than that for which the war was waged.

§ 81. **Declaration and commencement of war.** A state of war at once suspends certain legal rights existing in times of peace and brings into operation certain laws of war. Thus, the immediate effect of war is to suspend all peaceful intercourse between the belligerent states and between the residents of these states, and to introduce new relationships and obligations between the belligerent states and neutral nations. This being so, the question as to the exact date of the beginning of hostilities and the formal evidence of their existence, becomes one of considerable importance. Originally the rules of war pro-

vided for a formal declaration, but in recent years that practice has been abandoned, and, while most nations deem it advisable to publish a manifesto or declaration of war, it cannot be said to be required by law. It has been held that the laws of war come into operation when actual hostilities begin, regardless of whether the declaration of war has yet been made (1), but that the declaration of war would determine the date of its commencement if made before actual hostilities took place (2). The Hague Conference of 1907 declared that hostilities ought not to commence without a previous and unequivocal notice, and that such a situation should not be effective against neutrals, until after formal notice or actual knowledge of the existence of war (3).

§ 82. **Effect of war on treaties.** This has been discussed in § 73, above.

Section 1. Effects upon Persons and Business Relations.

§ 83. **Combatants and non-combatants.** The existence of war between states makes their citizens and subjects the legal enemies of each other, and they remain in this hostile relation during the continuation of the contest. This does not mean, however, that the citizens of one state may attack, kill, and imprison the citizens of the enemy state at pleasure, nor that they can confiscate their property. On the contrary, the laws of war expressly provide that only a certain class of the enemy, known as

(1) The Panama, 87 Fed. 927.
(2) Dale v. Merchants Ins. Co., 51 Me. 470.
(3) Davis, Elements of International Law, 552.

belligerents or combatants, can legally take part in such hostilities, and then only when organized under the authority of the state. The Hague Conference of 1907 provides that the rights and obligations of belligerents extend to the regular organized army of the state and also to the militia forces and bodies of volunteers which have at their head a person responsible for his subordinates, who have a fixed, distinctive badge recognizable from a distance, carrying arms openly, and conforming in their operations to the laws and usages of war. All agents, contractors, and retainers of the camp, who accompany the army in official capacity and assist in its movement or maintenance, are entitled to the rights of belligerents or combatants if captured (4). Non-combatants are all those residents of the hostile country who pursue their ordinary avocations, and are exempt or are not organized or called into the military service of the state. They lose their character as such, however, whenever they engage directly or indirectly in hostile acts against the enemy, whether through the order of their government or acting upon their own initiative. When performing hostile acts without the authority of their state, they act illegally, and are no longer entitled to the rights of belligerents, but may be punished according to the degree of the offence, either by the enemy or the authorities of their own states.

§ 84. **"Reasonable necessities of war."** The subjects or residents of an enemy state are divided into the two classes of combatants and non-combatants that have just been defined. In determining what are the rights of per-

(4) Davis, 573-4.

sons which the enemy must respect, we must begin with the fundamental principle upon which the rules of modern warfare have been largely based, which is, that "the measure of permissible violence is furnished by the reasonable necessities of war." The reasonable necessities of war are limited by the immediate objects of war, as distinguished from the ultimate purposes to be accomplished. The Institute of International Law declared in 1880 that the only legitimate end that a state may have in war is to weaken the military strength of the enemy (5). This seems to be sound doctrine, and was promulgated in the declaration of St. Petersburg of 1868. The modern tendency is to forbid all practices resulting in needless destruction of life and property. The fundamental principle seems to be that there must be a reasonable proportion between the amount of life and property destroyed by a hostile practice, and the effectiveness of that practice to break down armed resistance. Thus the bombardment of an unfortified town means the wanton destruction of life and property, while it has no direct effect in breaking down armed resistance except to intimidate the enemy, and it is held therefore to be illegal (6).

§ 85. **Rights of non-combatants.** Applying these principles towards the treatment of non-combatants by the enemy, the case is clear that generally non-combatants should be free from all direct injury or attack. It is obvious that while the slaughter of non-combatants would

(5) Wilson & Tucker, 237.
(6) Hall, 391.

have a tendency to break down the armed resistance of the state, yet its effectiveness in this regard would be entirely disproportionate to the loss of life and property entailed by such a practice. There are certain non-combatants, however, whose imprisonment would many times materially aid in breaking down the resistance of the enemy, and which would not on the other hand result in any excessive amount of suffering or cruelty. The imprisonment of such persons is therefore considered legal, and may be applied to sovereigns, ministers, or other high officers of state, or to private citizens who are especially useful in war, such as sailors, telegraphers, and similar persons.

§ 86. **Treatment of combatants: Giving quarter.** The right to kill and wound the armed forces of the enemy state in general ceases, as soon as the belligerents are incapacitated for the conflict, or as soon as they surrender. To kill them after they ceased to be a factor in the fight would not be a reasonable step towards the breaking down of hostile resistance. The duty of giving quarter to combatants in such cases is well established. It has been generally supposed, however, that there is no duty to give quarter when enemies have violated the laws of war, or where their commander or government has done acts justifying reprisals, or where the giving of no quarter is necessary, because the belligerents cannot cumber themselves with prisoners, without danger to themselves (7). The validity of these exceptions is cer-

(7) 2 Westlake, 75; Instructions for Govt. of Army of U. S. in the Field, art. 60.

tainly open to doubt today, and, upon the principle of the case, it would seem that the inhumanity of slaughtering prisoners of war is grossly disproportionate to its effectiveness in overcoming the armed resistance of the enemy. The second Peace Conference at The Hague adopted a convention in which among other things it is "especially forbidden . . . to wound or kill an enemy, who, having laid down his arms, or having no longer means of defense, has surrendered at discretion; (or) to declare that no quarter shall be given" (8).

§ 87. **Same: Conventional provisions.** The liability of surgeons to be detained as prisoners of war, the possibility of the capture of hospital property, and similar difficulties, made the proper care of the sick and wounded on the field very difficult, with the result that in the Geneva convention of 1864 provisions were adopted, which were amplified by the supplemental agreement of 1868, attempting to facilitate the care of the sick and wounded. These provisions have been replaced in the Geneva Convention of 1906 and in the Peace Conference of 1907. They grant immunity to the wounded, to surgeons and others assisting them, and provide that field hospitals cannot be diverted from their use. The capture of hospital ships is forbidden and the Red Cross is adopted as the sign of the sanitary service of the army (9).

While it is clear that the Conventions of the Peace Conferences at The Hague and similar conventions are binding only upon the signatory powers, yet it is likely that

(8) Bordwell, Law of War, 282-3.
(9) Bordwell, 249-77; Hall, 394-99.

most of the provisions receiving such sanction will be accepted by the nations of the world.

§ 88. **Prisoners of war.** "All persons whom the belligerent may kill, and all persons who may be separated from the mass of non-combatants by their importance to the enemy's state, or by their usefulness to him in his war, on surrendering or being captured, become prisoners of war" (10). The law regarding the treatment of such prisoners is well summarized in one of the conventions of the Second Peace Conference (11). Prisoners of war must be humanely treated, and with no greater severity than is necessary to prevent their escape. All their personal belongings, except arms, horses, and military papers remain their property. The state may utilize the labor of prisoners, according to their rank and aptitude, officers excepted, provided the tasks be not excessive and have no connections with the operations of war. The profits of such labor must be expended in improving their condition, the balance being paid to them upon their release. The capturing government is charged with the maintenance of prisoners of war and they shall be treated as regards food, lodging, and clothing, as the troops of the capturing government.

Where the laws of the prisoners' country allow it, prisoners may be paroled, and their government is bound neither to require of them or accept from them any service incompatible with their parole, which is generally an

(10) Glenn, 187.

(11) Convention concerning the laws and customs of war on land, Chap. II.

agreement not to engage in any further active service in the field and holds good until peace has been established (12). Parole cannot be enforced upon prisoners against their consent. A person breaking his parole, if captured, forfeits his rights as a prisoner of war, and may be brought before a court martial and given the extreme penalty of death (13).

§ 89. **Enemy character of persons.** The general rule has been stated that all the subjects or citizens of enemy countries are enemies. This, however, must be limited by certain well defined exceptions. All the persons found in the military or naval forces of a belligerent state, regardless of their nationality, are obviously possessed of enemy character. Seamen navigating the merchant vessels of the enemy state, and citizens of the opposing or neutral states, when domiciled in the enemy state, are impressed with the enemy character. If domiciled in the enemy state, while they cannot be compelled to perform military service, they pay taxes to the enemy and help to form one of the indirect sources of the enemy's strength (14). Persons domiciled in territory under the military conquest of a belligerent are, for the same reasons, impressed with the character of the occupying enemy, even as against the state of their original allegiance (15). From this it must be evident that it is not nationality but domicile that determines enemy character. The underlying principle is that enemy character belongs to those

(12) Instructions for Govt. of U. S. Armies in Field, sec. 130.
(13) 2 Halleck, 34.
(14) Lawrence, 366-75.
(15) Thirty Hogsheads of Sugar v. Bayle, 9 Cranch, 195.

who are of direct or indirect assistance to the enemy state, and persons domiciled in a state contribute indirectly to its support. Domicil is determined by length of residence and intent to reside there indefinitely. Where there is evident intent, domicil is acquired at once by taking up residence (16). Length of residence alone, however, may determine domicil (17). In cases of acquired domicil, however, the character of the original domicil easily reverts, for it has been held that it reverts upon the mere leaving of the new domicil for the old one (18). It is equally true that a citizen of an enemy state may lose his enemy character by acquiring a domicil in a neutral state.

§ 90. **Peaceful intercourse between enemies.** The statement is generally made that war itself renders all peaceful intercourse between persons invested with enemy character illegal. A contrary view has been held in some cases, that it is not the existence of war but the prohibition of the political authorities in time of war that makes it illegal (19). Although this latter view cannot be said to be the established law (20), the fact must be borne in mind, however, that whether special action of the political authorities is necessary or not to make intercourse illegal, the illegality is the result of the municipal law of the states involved, and not of international law, which only gives to the state the right to interdict commerce in

(16) Wheaton, International Law, sec. 321.
(17) The Harmony, 2 Rob. Adm. 324, 325.
(18) The Venus, 8 Cranch, 253.
(19) Matthews v. McStea, 91 U. S. 7.
(20) Exposito v. Bowden, 4 El. & Blackburn, 963.

time of war, but does not itself prohibit it. Where intercourse is interdicted by war, any relations of contract, agency, or partnership, entered into by the subjects of enemy states during the war, are void by the common law theory of illegality (21). Any similar relations entered into before the beginning of war, which involve intercourse between enemies, are suspended during the war or extinguished, depending upon whether they could be taken up at the end of the war with equity to both parties (22). Agents may bind their principals in the enemy country, if the agency was created before the beginning of war and their relations do not involve any intercourse between them during the war (23). Where debts cannot be paid because it would involve intercourse with the enemy, there is a conflict of authority, but the better view is that interest can be collected during the time of the war (24). Where, as in the United States and England, an alien enemy cannot use the courts of the state, the statute of limitations does not run (25) during the time of the war. However, the Second Peace Conference adopted provisions that practically prohibit a belligerent from refusing the use of its courts to alien enemies (26). Ransom contracts, ransom bills, safe conducts, etc., because a state of war contemplates such contracts, are consid-

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(21) Potts v. Bell, 8 Term Rep. 548.

(22) N. Y. Life Ins. v. Statem, 93 U. S. 24.

(23) Small's Administrator v. Lampkin's Exr., 28 Gratton (Va.) 832.

(24) Ex parte Boussmaker, 13 Vesey, 71.

(25) Hanger v. Abbott, 6 Wall. 532.

(26) Convention concerning the Laws and Customs of War on Land, art. 23, h.

ered legal (27). Since the prohibition of intercourse is a matter of municipal law, by that same law it may be made legal by granting licenses to trade with the enemy which will legalize such intercourse.

§ 91. **Belligerent subjects in hostile territory at outbreak of war.** Where citizens of a belligerent state are located in the territory of the enemy state at the outbreak of the war, the modern custom is to allow them a reasonable time in which to arrange their affairs and withdraw from the country; or to allow them to remain, on condition that they do no hostile act. As to whether the bringing home of their property with them constitutes trade with the enemy, there are conflicting decisions, the later ones holding that, if the property is removed as soon as possible with the intention of removing it from enemy control, it will not be considered trade with the enemy (28).

Section 2. Property of Enemy.

§ 92. **Public property on land: Movables.** Originally the laws of war allowed the capture of all property of the enemy, whether private or public, but in more recent times the rules of war have been greatly changed with a view to confining such acts to cases which really affect the military security of the enemy, and the general rule now is that all public property which the captors could use for warlike purposes and all property, which, if left to the enemy, could be used directly or indirectly to aid his cause, is subject to capture. The law is well summed

(27) Cornu v. Blackburn, 2 Doug. 640.

(28) Fifty-two bales of Cotton, Blatchford's Prize Cases, 664.

up in one of the conventions at the Second Peace Conference as follows: "An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies, and generally all movable property belonging to the state which may be used for military operations" (1).

§ 93. **Same: Immovables.** A different view prevails in regard to immovable property of the enemy, except where the property is of hostile character, as forts, navy yards, etc., since the title of the captor does not vest until occupation passes into subjugation at the end of the war, and its mere possession by the captor prevents its being used in any way to help the enemy. Consequently, the use and profits of immovable property is all that modern law allows. The convention adopted at the Peace Conference provided that "the occupying state be regarded only as administrator and usufructuary of public buildings, real estate, forest and agricultural estates belonging to the hostile state, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of the usufruct" (2). The seizure, destruction, or damage of the property of municipalities and institutions dedicated to religion, charity, education, and the arts and sciences, is expressly forbidden (3). Where military occupation passes into permanent occupation and owner-

(1) Convention concerning the Laws and Customs of War on Land, art. 53.

(2) Ibid., art. 55.

(3) Ibid., art. 56

ship, by virtue of permanent conquest or the treaty of peace, it is obvious that the title of immovable public property passes with it. The title to movable property captured on land passes with the capture (4).

§ 94. **Private property on land: Immovables.** In regard to immovable private property the law is that it cannot be confiscated and cannot therefore be alienated, doubtless for the same reason that the public property of the enemy cannot be confiscated, for the captors' right or ability to alienate such property must abide the fate of the war, and if he did sell, there is no assurance that he would be in possession at the end of the war, and therefore able to give a good title. It was provided at the Second Hague Conference that such property as is adapted for the transportation of persons and things, or for the transmission of news, and all kinds of ammunitions for war, though the property of individuals, may be seized, but the property must be returned and the compensation for its use determined when peace is made (5). In times of military necessity, however, immovable property of the enemy may be utilized for the quartering of troops, etc.

§ 95. **Same: Movables. Contributions.** Except in times of great military necessity, the movable private property of the enemy, which does not come under the provisions of the convention just mentioned, is subject to seizure only under regulations governing contributions

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(4) Titus v. U. S., 20 Wall. 475.

(5) Convention concerning the Laws and Customs of War on Land, art. 53.

and requisitions. Pillage and plunder have been abolished. The old view that war supports war still continues, but is subject to the regulations governing contributions and requisitions, which attempt to reduce the hardships to the minimum. The provisions of the Hague Convention regarding *contributions,* which consist of moneys levied by the troops in excess of the regular taxes, provide: "No contribution shall be collected save in virtue of an order given in writing, and on the responsibility of a general-in-chief. This method of collection shall be resorted to only in accordance with the existing rules of assessment and apportionment. For every contribution a receipt shall be given to the contributor" (6). According to this, contributions must be levied in the same manner and by the same assessment, if possible, as the taxes of the occupied territory were assessed by the regular government. The receipts given to the contributors are for the purpose of enabling the contributor to make a claim against his own government at the close of the war, and also to show to any other officers of the enemy who might later demand a contribution.

§ 96. **Same: Requisitions.** Requisitions consist of services, supplies, and all things that are necessary for the support of the army. The convention at The Hague provides that requisitions shall be limited to the things needed by the army of occupation, shall bear some relation to the resources of the community, and shall not imply an obligation on the part of the inhabitants to take part in military operations against their own country.

(6) Ibid., art. 51.

They shall be demanded only upon the authority of the commander of the occupied locality, and as far as possible shall be paid for in cash. Where not possible, receipts shall be given, for which payment shall be arranged as soon as possible (7).

Where a naval force is in need of supplies, the question may be raised whether contributions or requisitions may be demanded by them. This proposition is covered by one of the conventions of the Second Peace Conference, which allows a naval force to demand necessary requisitions and to enforce the demand with bombardment, if necessary, but the right of the naval force to enforce their demands for contributions by bombardment is prohibited.

§ 97. **Confiscation of public and private debts.** The law is now well established that debts owned by enemy individuals or nations against the state cannot be confiscated. It has been contended by some recent writers that the debts owned by enemy individuals are still subject to the right of confiscation, but that states have merely failed to take advantage of that right in recent times. This question may be considered definitely determined by the action of the Second Peace Conference, which forbids the abolition or suspension of the rights and actions of enemy persons (8).

§ 98. **Enemy character of property upon the seas.** Before we can discuss the confiscation of enemy property, we must ascertain what property is impressed with

(7) Ibid., art. 52.
(8) Ibid., art. 23, h.

enemy character when upon the seas. Property is enemy property on the seas when it is the public property of the enemy; when it is the private property of persons who are themselves impressed with enemy character; when it is the produce of estates owned by neutrals, but where the estate is situated in the enemy country, so long as it remains the property of the owner of the hostile soil (9); when the property is owned by neutrals, but is connected with a house of trade, owned by them and situated in enemy territory (10); and when merchantmen are owned by subjects of neutral states, but are sailing under the enemy flag.

§ 99. **Capture and confiscation of property at sea.** The general rule may be laid down that enemy property, whether public or private, found upon the seas or in the territorial waters of either belligerent, is liable to capture and confiscation. This however is subject to certain limitations which we must now consider. By strict legal theory, enemy property upon the seas or in the territorial waters of either belligerent is subject to confiscation the moment of the outbreak of the war. In recent years it has been the practice, however, to grant certain days of grace to enemy vessels within the territorial waters of the belligerent and immunity to vessels which had already sailed before the war commenced for the ports of the belligerents, for the voyage to and from such port. Such was the nature of the convention adopted at the Second Peace Conference, which, however, exempted all vessels from

(9) Thirty Hogsheads of Sugar, 9 Cranch, 195-9.
(10) The Freundschaft, 4 Wheaton, 105.

these privilges, whose construction indicates that they are intended to be transferred into vessels of war.

§ 100. **Same: Exceptions.** Among the clear exceptions to the above rules allowing capture are the cases of vessels actually engaged in cartel service, vessels engaged in exploration and scientific work, small coast fishing vessels, and hospital ships. Provisions adopted at the Hague Conference makes the postal correspondence of neutrals and belligerents both free from capture (11). For the past century or over there has been a growing agitation for the abolition of the capture of private property at sea, which culminated in the declaration of Paris of 1856. Among other things this declaration provided that the neutral flag covers enemy goods and makes them free from capture, and that neutral goods, though under enemy's flag, are exempt from confiscation, except where it may be contraband of war in either case. It is true that this only binds the signatory powers, but it is most unlikely that any other nations would in time of war fail to abide by the provisions.

§ 101. **Same: When title vests.** The capture of a private enemy ship takes place when it has surrendered, and the captors have evidenced an intention to take possession of it. The title does not vest in the state completely, however, until it has been brought into a prize court and properly condemned. It is the duty of the captors, where possible, to bring the ship in for condemnation, but where impossible, because of inability to care for it, it may be

(11) Convention Imposing Certain Restrictions upon the Rights of Capture in Maritime Warfare, art. 1.

destroyed without condemnation, or ransomed to the owner (12).

Section 3. Military Occupation of Territory.

§ 102. Military occupation. Military occupation is justified on the plain ground of military necessity, and the rights of the occupying authority arise out of this necessity and are limited by it. Rights over the property of the enemy in such territory have been discussed, and we are here concerned with the rights and duties of the occupying state with regard to the inhabitants and their government. The general rules governing occupation were embodied in the provisions adopted at the Second Peace Conference. "Territory is regarded as occupied when it finds itself placed under the authority of the hostile army. The occupation includes only the territory where that authority is established and in a position to be exercised. The lawful authority having passed, in fact, into the hands of the occupant, he will take all steps which depend upon him with a view to re-establish order, as far as possible, by respecting, save in case of absolute impediment, the laws in force in the country" (13). The inhabitants are bound to render obedience to the occupier in regard to all things looking to the better government of the occupied territory. It is equally clear, however, that summary punishment may be resorted to when justified by military necessity, and that all acts injurious to the occupier may be forbidden on the same ground.

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(12) Bordwell, Law of War, 223-6.

(13) Convention concerning the Laws and Customs of War on Land, arts. 42, 43.

§ 103. Duties of local officers. All political officers cease in the performance of their functions with the beginning of occupation, but mere administrative and local officers, on the other hand, are considered under a duty to remain at their posts, since the welfare of the inhabitants and of the public at large demands the continuance of the ordinary administrative functions. An oath of fidelity may be required of these officers by the occupying authorities, to the effect that they will not use such offices to the injury of the occupying forces (14).

§ 104. Limitations of occupying authority. "It is forbidden for a belligerent to force the inhabitants of occupied territory to give information in respect to the opposing belligerent or his means of defence. It is forbidden to constrain the population of an occupied territory to recognize, by the taking of an oath, the power of the enemy" (15). They cannot require officers to perform duties contrary to their allegiance, or attempt to compel the inhabitants to do any positive act inconsistent with it. The convention also provides that the family honor and rights, the lives of individuals, and private property shall be respected. Pillage is prohibited. Collective penalties cannot be executed against the whole community for the acts of individuals, where the community is not collectively responsible for them. The justice of this provision is obvious (16).

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(14) Bordwell, 297-309.
(15) Convent. concern. War on Land, arts. 44, 45.
(16) Ibid., 46, 47, 50.

Section 4. Methods of Warfare.

§ 105. General principles. The rights of belligerents in regard to enemy property, enemy persons, and occupied enemy territory have been considered in the preceding chapters. We are now to consider what are the means of defence and offence by which military operations may be waged and the rights of belligerents exercised. Originally all means of offence and defence were allowable in war, but advancing civilization has placed substantial limitations upon these rights. In determining the rights of the belligerent in regard to the enemy, we saw the underlying principle to be that all acts against the enemy are justified to just the extent that they are directly effective in overcoming the resistance of the enemy, and that there must be some reasonable proportion between the amount of destruction of life and property involved and the military efficiency of the measures employed (17).

§ 106. Forbidden instruments and acts of warfare. To employ poison or poisoned arms, to kill or wound by treachery, to employ arms, projectiles, and substances which are calculated to cause unnecessary pain are all prohibited (18). The declaration of St. Petersburg condemns the employment of arms "which uselessly aggravate the suffering of disabled men or render their death inevitable." The purpose of injuring combatants is only that they may be disabled from taking further part in military operations of the enemy, and any instruments

(17) Convention concerning the Laws and Customs of War on Land, art. 25.

(18) Ibid., art. 23, a, b, c, e.

of destruction that necessarily do more than maim him, exceed the legitimate ends of war.

The bombardment by naval forces of undefended towns is forbidden, with the provision that the prohibition shall not prevent the destruction of military works, naval establishments, etc., which would be of aid to the enemy, care being required, however, to see that the other parts of the town shall be damaged as little as possible. In all cases of bombardment where military necessity permits, notice must be given to the authorities, and great care exercised not to destroy or injure buildings devoted to science, charity, hospital, and similar purposes (19). The employment of automatic submarine contact mines was discussed at the Hague, and regulations adopted which have for their main puropse the protection of innocent vessels of commerce from such dangers (20). The destruction of enemy property is prohibited, unless it is demanded by strict military necessity. The Second Peace Conference agreed upon the prohibition of discharging of explosives from balloons for a period extending to the next peace conference.

§ 107. Use of deceit and spies. Deceit is a proper and legal method for an enemy to surprise or mislead the belligerent, but this is always subject to the qualification that the flag of truce or Red Cross must never be used for that purpose. The insignia of the enemy may be used to approach or gain a point of advantage, but, before the

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(19) Convention concerning the Bombardment of Undefended Towns by Naval Forces, arts. 1-6.

(20) Convention restricting the Employment of Submarine Mines and Torpedoes.

fighting begins, the enemy must display their true identity (21). Spies are those who invade the lines of the enemy in disguise for the purpose of getting information to carry back with them. If captured before they make their escape to their own forces, they may be put to death, but only after trial. Persons sailing over the camp of the enemy in a balloon are not considered spies (22).

§ 108. **Privateering.** A privateer is a private armed vessel, owned and officered by private individuals but acting under the authority of the state, which is sent forth in time of war to prey upon the commerce of the enemy, and whose compensation consists in the prizes captured. The authority given to such vessels is given by *letters of marque*. The right to use privateers is still recognized, although there is a growing demand for their abolition. The declaration of Paris, to which all the larger powers with the exception of Spain, Mexico, and the United States were parties, provided that "privateering is and remains abolished." The Second Peace Conference also adopted provisions for the abolition of privateering (23).

§ 109. **Volunteer navy.** Privateers must be distinguished however from such vessels as compose the volunteer navy of Russia, where vessels privately owned and manned are incorporated into the regular navy and commanded by commissioned officers, though in time of peace they fly the commercial flag of the country and are engaged in private business. They are, however, a part

(21) Bordwell, 283-4.

(22) Hall, 533-36.

(23) Convention concern. the Transformation of Merchant Vessels into ship of War, arts. 1-7.

of the navy, under its discipline, and therefore their propriety cannot well be questioned (24).

§ 110. **Punishment of offenders against laws of war.** The belligerent undoubtedly has the right of punishing enemy persons coming into their control who have violated the laws of war, unless they were acting under the direct command of an officer, in which case the officer may, if captured, be punished for the act. Only breaches of universally recognized laws should be punished, however, such as poisoning wells, assassination, abusing the use of the flag of truce, using forbidden weapons, and similar offences. Hostages are many times seized by the belligerent to secure the performance of obligations (25).

§ 111. **Non-hostile relations.** There are certain occasions during war when it becomes to the mutual advantage of both belligerents to establish some form of non-hostile intercourse between them. Consequently such forms of intercourse are not only permissible, but are carefully guarded in such a manner as to make them as available as possible without danger to the parties concerned. The law regarding such intercourse under a flag of truce is well stated in the provisions adopted by the Hague Conference as follows: "An individual who is authorized by one belligerent to enter into communication with the others, and who presents himself with a white flag, is regarded as the bearer of a flag of truce. He has the quality of inviolability, as have the trumpeter, bugler, or

(24) Hall, 520-23.

(25) Instruction for Government of Armies of U. S. in Field, art. 27, 28.

drummer, and the flag bearer and interpreter who accompany him. The commander to whom the flag of truce is sent is not obliged to receive it, under all circumstances. He may take all necessary measures to prevent the bearer of the flag from profiting by his mission to obtain information. He has the right, in case of abuse, to detain the bearer of the flag temporarily. The bearer of the flag of truce forfeits his quality of inviolability, if it is proved, in a positive and unexceptionable manner, that he has profited by his privileged position to provoke or to commit an act of treachery'' (26). Suspension of arms and armistices, cartels, capitulations, and passports, are other forms of non-hostile intercourse between belligerents which are guarded by the rules of war against abuse.

Section 5. Termination of War.

§ 112. Modes of termination of war. War may be terminated by mere cessation of hostilities, by subjugation, by proclamation (if a civil war), and by treaty of peace. In the first case the effect of cessation of hostilities is merely to leave the belligerents in the positions they occupy at the time hostilities cease. Subjugations must be distinguished from mere conquest. The latter is the first step in subjugation, which may be defined as ''extermination in war of one belligerent by another, through annexation of the former's territory after conquest, the enemy forces having been annihilated'' (27). In the case of the Civil war in the United States, the courts have held

(26) Convention concerning Laws and Customs of War on Land, Ch. III.

(27) 2 Oppenheim, 278.

that its termination was determined by the proclamation of the President (28).

§ 113. **Effect of treaty of peace.** Most wars are terminated by a treaty of peace, and while this, like other treaties, must be ratified before it becomes binding upon the states, it is binding at once to the extent that hostilities must cease with the signing of the treaty, unless another time is placed in the treaty as the date for the cessation of hostilities. In this way the treaty acts as an armistice, if none has been concluded pending the adoption of the treaty, until it has been duly ratified or rejected. Unless expressly provided otherwise, peace commences with the signing of the treaty, but, in cases of world wide wars, it has been customary in the past to stipulate different times at which the treaty would go into effect at different places.

The main effect of the treaty is the restoration of all peaceful relations, and the interdiction of all hostile operations. By the principle of "uti possidetis," unless the treaty specifies otherwise, everything remains just as it did at the time peace is concluded. Thus, property in the occupation of the other belligerent, if not specified otherwise in the treaty, becomes the permanent possession of the occupying power. In the absence of contrary provisions, the treaty gives complete amnesty for all crimes against the laws of war committed by the state or individuals during the war.

§ 114. **Postliminium.** By the principle of *postliminium* there is "a revival of the previous conditions of things"

(28) The Protector, 12 Wall. 700.

after cessation of hostilities, except where the conditions changed were the result of acts which the belligerent had a legal right to perform. Thus, during the Franco-German war, the German government sold timber off lands belonging to the French, which they were holding by military occupation. When the occupation ceased, the purchasers of the timber were prevented from taking it by the principle of postliminium, for Germany had no right to confiscate or alien the timber according to the laws of war, and therefore, when it came back into French possession, the previous condition of things revived, shutting off the rights of the purchasers of the land in favor of the original owners (29). Had the German government acquired the title according to the laws of war, then the theory of postliminium would have had no application.

(29) 2 Oppenheim, 295-97.

CHAPTER VI.

NEUTRALITY.

Section 1. Between Belligerent and Neutral States.

§ 115. Definition of neutrality. Neutrality consists in the non-participation by one state in a war that is being carried on between two or more other states, and in an impartiality of conduct towards all belligerents. A *permanent neutrality* is the term applied to a state that has been stripped of that part of its sovereignty which entitles it to engage in offensive warfare. An *armed neutrality* is a form of alliance between two or more states for the purpose of protecting certain neutral rights which are publicly proclaimed. With these two special forms of neutrality we are not here concerned.

§ 116. Underlying principle. The laws of neutrality have been greatly augmented and changed within the last century, with the idea of clearly defining the rights of neutrals and their subjects as against belligerents, and of determining reasonable regulations for the conduct of neutrals in their relations with belligerents. The underlying principle seems to be the right of every independent state to remain in peace while other states are engaged in war, and the corresponding rights of a belligerent to demand that no state, not a party to the con-

flict, shall participate either directly or indirectly in the contest. In recent years it has become the custom for neutral states to issue proclamations of neutrality, or give expression to it in some public form upon the outbreak of war.

§ 117. Inviolability of neutral territorial jurisdiction. The modern tendency in the laws governing neutrality is to remove the neutral as far as possible from all inconveniences resulting from belligerent conditions, and no principle of the law is more firmly settled than the inviolability of neutral territorial jurisdiction. The Second Peace Conference, in adopting rules and regulations concerning neutrality, expressly recognized the inviolability of the neutral's territory. The passage of troops and convoys through neutral territory, the formation of army corps and the establishment of recruiting stations, the bringing of prizes into neutral waters, and similar acts violating the neutral's jurisdictional rights are forbidden to belligerents; and it is further provided that the enforcement of these prohibitions by force cannot be considered a hostile act by the offending belligerent (1).

§ 118. Local neutral regulations. By the laws of neutrality, considerable is left to the neutral state in the way of determining its relations with the belligerents. The convention regarding neutrality at the Second Peace Conference expressly recognized the right of the state to make its own neutral regulations, regarding such mat-

(1) Convention concerning the Rights and Duties of Neutral Powers and Individuals in Warfare on Land, arts. 1, 2, 3, 4, 10; Hague Convention concerning the Rights and Duties of Neutral Powers in Maritime Warfare, arts. 1-5, 12, 16.

ters as the length of time belligerent war vessels may remain within territorial waters, the order in which vessels of opposing belligerents may be compelled to leave when several are in the port of the neutral, the regulations regarding the amount of coal to be supplied to belligerents, and the conditions under which belligerents may be allowed the use of the regular telegraph and telephone lines. The conventions provided in most instances the rules to be followed in each case, where the neutral had no regulations of its own. In the making and enforcing of such regulations, however, international law demands that the neutral shall do so with exact impartiality to all belligerents (2).

§ 119. Neutral must prevent assistance of belligerents in its territory. Since the territorial jurisdiction of the neutral must be held inviolable by the belligerents, there is a clear responsibility and duty on the part of the neutral to see that its territory is not made use of, to the injury of the belligerents, which duty must be exercised with due care and diligence. It is under obligations to see that the belligerent powers live up to their obligations not to violate its jurisdictional rights by the establishing of prize courts, the carrying on of hostilities, and the performance of similar acts, upon the territory of the neutral. It was formerly held that such violations of its jurisdiction could be allowed by the neutral, if allowed to both states with impartiality, but the rule as it now exists clearly prohibits the neutral from consenting to any violation of its territorial jurisdiction, which is

(2) Ibid.

directly or indirectly connected with the waging of hostilities. The neutral must forbid the passage of belligerent troops through its territory, and, should they come within its jurisdiction, the neutral must intern them as far as possible from the basis of military activities. Prisoners of war brought with them must be released. The passage of sick and wounded may be allowed under certain conditions, but they must be closely inspected by the neutral power.

§ 120. **Same: Equipment of soldiers and ships.** The neutral must also see that no expeditions are fitted out upon its territory or soldiers recruited, although it is under no obligations to prevent persons from leaving its territory to engage in hostilities with the belligerents, or to prohibit its citizens from making and selling ships of war and ammunition to belligerents, so long as it is a matter of regular commerce and not done to the special order of the enemy. The Peace Conference made the following provisions regarding the equipment of ships for the enemy: "A neutral government is bound to use all the means at its disposal to prevent the equipment, within its jurisdiction, of any ship which it has a reasonable ground to believe is intended to cruise or take part in hostile operations against a power with which it is at peace. It is also bound to use the same diligence to prevent the departure from its jurisdiction of any vessel destined to cruise or take part in such hostile operations, and which shall have been adapted, wholly or in part, to war-like use within such jurisdiction" (3). Belligerent

(3) Hague Convention concerning the Rights and Duties of Neutral Powers in Maritime Warfare, art. 8.

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vessels can only make such repairs within territorial waters as are necessary to make navigation reasonably safe, and nothing can be added to their military equipment or supplies.

§ 121. **Neutral must render no direct assistance.** It is obvious from what has already been said, that a neutral is forbidden to render any active assistance whatsoever to the belligerents. Even where by treaty stipulation it has been previously arranged that in case of war the neutral shall render certain assistance to one of the belligerents, the rendering of such assistance is illegal, for a treaty stipulation cannot destroy the rights of a third power. A neutral state cannot therefore furnish any military assistance of any kind to the belligerent. This is generally held to prohibit the loan of money by the neutral state. As before stated, however, this obligation does not extend to prohibiting private citizens from doing these acts as incidental to regular commerce and business.

§ 122. **Right of asylum.** It is not the duty of a neutral to admit troops, war property, etc., within its territory, but, if the neutral sees fit to do so, it is then under duty to see that such troops are disarmed, that they are interned or paroled until the close of the war, and that the property is kept there until the end of hostilities; otherwise the territory of the neutral would become a base of military operations for the belligerent (4).

Section 2. Blockade.

§ 123. **Definition of blockade.** The right to blockade

(4) 2 Oppenheim, 409.

is the right of a belligerent to exclude all trade or intercourse by water from the port of the enemy. It is not confined to a seaport, but extends to any avenue of water communication such as rivers, bays, or mere marginal seas of the enemy territory. It is generally held, however, that it will not extend to international rivers, where all the states situated on the river are not enemies. Thus, when a United States cruiser captures a boat on the Mexican shore of the Rio Grande river, after having declared the whole coast of the southern states under blockade, the boat was released on the ground that the blockade could not be applied against commerce with a neutral (5).

§ 124. **When effective?** Continental writers contend that a blockade cannot be established until notification has been given, but the United States and England hold a contrary view, that its mere establishment is sufficient to begin a blockade, although notice is necessary before condemnation for breach of blockade can take place (6). By the declaration of Paris a "blockade to be binding must be effective." Just what is the test of effectiveness has never been determined, though the tendency since the American Civil war seems to be in favor of a liberal construction, holding that a blockade, which may render an effort to "run the blockade" reasonably dangerous, is sufficient. This is the rule followed by England and America (7), though continental authorities tend to a more strict construction. A blockade terminates when the vessels enforcing it are withdrawn, or when they are

(5) The Peterhof, 5 Wallace, 49.
(6) The Vrouw Judith, 1 Rob. 150; U. S. Naval Code, art. 37.
(7) The Franciska, Spinks, 287.

driven away by the enemy, however short their absence. A temporary absence, however, when due to the stress of weather, does not even suspend the blockade (8). When the blockading fleet is away in pursuit of a prize, so that a neutral vessel might reasonably suppose that abandonment had taken place, the ship may enter without violating the blockade.

§ 125. **Breach of blockade.** A breach of blockade consists in entering or leaving, or in attempting to enter or leave the blockaded place, and, by the practices of England and the United States, in doing that which evidences an intent to violate the blockade. All states hold that notice of some kind to the blockade runner is essential before a breach of blockade may be punished. France and some other countries hold that each vessel must have personal notice from one of the blockading squadron before it can suffer the penalty for breach of blockade, while England and the United States hold that merely constructive notice is sufficient.

By the English and American rule an attempt to run a blockade is held to exist, where a vessel is found near a blockaded port or steering for it, even though its papers show that another port is its real destination, or where a ship starts on a voyage destined to a blockaded port of which the vessel has either constructive or actual notice (9). By the doctrine of continuous voyage, this rule is extended still further by holding, that, when vessels leave for a neutral port with the intention of having

(8) The Hoffnung, 6 C. Rob. Adm. 116.
(9) The Betsy, 1 Rob. 332.

the goods reshipped from there into the blockaded port, it is an attempt to run the blockade from the time the vessel leaves for the neutral port. During the Civil war, the United States applied the doctrine of continuous voyages in cases where the ultimate destination of goods was a blockaded port, although unknown to carriers at the time (10). When a vessel enters a blockaded place to secure repairs or provisions, or is forced in by stress of weather, there is no breach of the blockade (11). War-ships of neutrals are generally allowed to enter as a matter of courtesy.

§ 126. **Same (continued).** A ship may be captured for breach of blockade any time before the completion of the voyages during which the breach occurred (12). The crew cannot be held as prisoners of war, but may be detained as witnesses in condemnation proceedings. The penalty is confiscation of boat and cargo, where both are owned by the same parties, or where the cargo is made up of contraband, or where the owners of the cargo knew of the blockade (13). Where the owner of the cargo did not know of the blockade, or where the ship deviated from its course to the blockaded place, only the ship is condemned. Where a ship is captured carrying goods whose ultimate destination is a blockaded port, but where the ship is only bound for a neutral port and has no knowledge of the ultimate destination of the goods, only the cargo will be condemned (14).

(10) The Bermuda, 3 Wall. 514.
(11) The Fortuna, 5 Rob. 27.
(12) U. S. Naval War Code, art. 44.
(13) The Mercurius, 1 Rob. 80.
(14) The Springbok, 5 Wall. 1.

SECTION 3. CONTRABAND AND UNNEUTRAL SERVICE.

§ 127. Definition of contraband. Contraband of war consists of those commodities which are necessary or useful in the prosecution of hostilities. There are two kinds of contraband as it is generally defined, *absolute* contraband and *conditional* contraband. The first consists in articles which by their nature are primarily and ordinarily destined for use in war, such as arms, ammunition, and military and naval equipment. Conditional contraband consists of those articles which by their character are not ordinarily for use in war, but which under certain circumstances may become needful for the prosecution of war. Horses, provisions, and coal are instances of this class. To enumerate or to draw a distinct line between the two classes of contraband is impossible. Just what constitutes contraband has been the subject of many treaty stipulations between nations. Ordinarily the determination of what is contraband is left to the belligerents to determine in each case, though of course this discretion must be exercised in a reasonable manner, and, if not, it may become a just ground of complaint by the neutral. Whatever may be the nature of articles, however, they must be destined for use of a belligerent in war, before they can be so considered (15). Articles which are carried for the use of the boat only are not contraband.

§ 128. Carriage of contraband. The carriage of contraband is the transportation of contraband to an enemy port or vessel, and, by the more liberal construction of

(15) 2 Oppenheim, 486.

England and the United States, it is the transportation of contraband whose ultimate destination is the ports or ships of the enemy. Both American and English courts have adopted the theory of continuous voyage (§ 125, above) in regard to contraband, both where the goods are to be reshipped in the same boat for the enemy destination, and where they are to be shipped in another boat, holding that they are liable for seizure for contraband from the time they start upon the first voyage, whose ultimate destination is the port of the enemy (16). When the ship has deposited her cargo of contraband, she is then no longer engaged in an illegal transaction and consequently cannot be seized upon her return voyage; except in the cases where the contraband was carried under false papers (17).

§ 129. **Same: Penalty.** In regard to the penalty for carrying contraband, the prize courts of the different countries hold different and conflicting views, the only one common view being held is that the contraband goods themselves are subject to confiscation, except where vessels carrying contraband sail before the beginning of the war and have received no actual notice of the existence of hostilities (18). The rules which prevail in the United States and England provide for the confiscation of both ship and goods, where they are both owned by the same owner, or where the owner of the ship has knowledge of the fact that it is engaged in carrying contraband. Such part of the innocent cargo as belongs to the owner of

(16) The Peterhof, 5 Wall. 49.
(17) Perils, sec. 46.
(18) The Nancy, 3 Rob. 122.

the contraband is also subject to confiscation. Vessels are confiscated when found carrying contraband under false papers (19). In cases where the goods concerned are only conditional contraband, it is the English practice to exercise the right of preemption, by purchasing the goods in question at their mercantile value plus a profit of 10%. The boat is allowed to go free.

§ 130. **Unneutral services.** A case somewhat similar to carrying of contraband is that of carrying persons or messages for the enemy. It differs from contraband in that it involves direct service of the enemy, while contraband does not. Belligerents have the right to punish neutrals for carrying to or from the enemy ports members of the armed forces of the state, persons who are going to the state to become members of the armed forces, and other important persons such as public officers, who might be made prisoners of war if captured by the enemy. There is an exception, however, in favor of diplomatic agents, since the diplomatic relations of neutrals with the belligerents should not be interrupted. They may also be punished for the carrying of dispatches of the belligerent governments having to do with military affairs, although dispatches of the government to other governments or to diplomatic agents are exempted. There is also a tendency to hold mail bags free from interference, but there is yet no such established doctrine.

Vessels cannot be punished for such acts, however, unless they have knowledge of the nature of the persons they are carrying, or of the dispatches on board, or unless

(19) Holland, Prize Laws, 82-7.

they are in the direct service of the enemy (20). The penalty is confiscation of the vessel, and the cargo also where the cargo is owned by the owner of the vessel (21). The crew may be taken as prisoners of war.

§ 131. **Right of visit and search.** The right of visit and search is the right of belligerent vessels to stop private vessels of the neutral, when outside of neutral waters, for the purpose of examining their papers and cargo with a view to seeing that the rules of neutrality are being observed. Only a regularly commissioned public vessel of the belligerent has the right of visit and search, and all private vessels of neutrals, when outside of neutral waters, are subject to that right, though public vessels are not. It has been contended by some states that, when a neutral vessel is under the convoy of a public armed ship, there is no right of visit and search; but that the presence of the armed neutral vessel is sufficient evidence and guarantee of the neutral state that there is no evasion of neutral obligations. This right has been seriously contested at times, and has never been fully accepted by all nations.

The vessels may be captured if they resist visit and search, or if they are under the convoy of a belligerent war vessel. Spoliation of papers, and double or false papers give the right to seize the vessel and bring it in to trial, which, if the evidence is sufficient, may result in its confiscation (22).

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(20) The Atlanta, 6 Rob. 440.

(21) The Hope, 6 Rob. 463.

(22) Livingston v. Md. Ins. Co., 6 Cranch, 274; The St. Nicholas, 1 Wheat. 417.

DAMAGES

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CHAPTER I.

PRELIMINARY TOPICS.

Section 1. General Survey.

§ 1. **Damages the ordinary redress afforded by a court of law.** Every plaintiff goes into court with a prayer for some sort of relief. His prayer may be that the court prevent an injury that is merely threatened, or that it grant a remedy for an injury that has already occurred. If he asks for the prevention of an injury, he must resort to a court of equity, which, in a proper case, may proceed by injunction; a court of law has no power to prevent the doing of a wrong, but acts only after a wrong has been done. See the articles on Equity and Trusts in Volume VI of this work. The defendant may threaten

to pollute the plaintiff's spring, to fell his shade-trees, or to injure his business by intimidating his employees; the law court can do nothing until the threat has been carried into execution; equity alone can afford preventive relief. If, on the other hand, the plaintiff seeks a remedy for an injury that has been done, the nature of the remedy available will also depend upon the court whose action he asks. The law court is restricted to remedial relief, but the court of equity may, in a case within its jurisdiction, afford either preventive or remedial relief as the facts warrant. And the remedial relief of a court of law differs from that of a court of equity. Equity affords specific relief; it commands a party to do or not to do a particular thing, to perform a contract, to abate a nuisance, to surrender a document, to execute a trust or what not, and obedience is enforced under penalty of imprisonment for contempt of court. Not so with a court of law; it seldom affords specific relief. Barring a few exceptional cases, including the specific recovery of real and personal property under some circumstances, the law court is confined to the awarding of pecuniary compensation as its sole form of redress. This compensation is known as *damages*. A legal judgment for damages is enforced, not by process directed against the person, but by a writ of execution under which the sheriff may levy upon the judgment debtor's property, sell, and convert it into money for the satisfaction of the judgment. Not only is the law court practically restricted to the awarding of damages; the awarding of damages is practically restricted to the law court, for it is only in exceptional

cases that a court of equity will decree the payment of damages. Thus, we may fairly say that damages are the peculiar as well as the ordinary redress obtainable in a court of law. The term "damages" has been well defined by one court as "the pecuniary compensation for an injury recovered in an action at law" (1).

§ 2. **Damages distinguished from injury and damage.** The term "damages" needs to be distinguished from two others with which it is often confounded and used interchangeably. In their popular signification the words "damage" and "injury" are closely synonymous, alike indicating hurt, harm, or loss. The word "damage" in its legal sense retains this meaning. One court, expressly following Webster, defines it as "actual loss" (1a). The word "injury" is often used, even by courts and law writers as meaning the same thing; the familiar expression "personal injury" is an example. But, in its strict legal signification, injury means "the violation of a right, something, in other words, for which an action will lie on behalf of the injured person; an actionable wrong" (1b). A has an empty feed-lot. B walks across it without A's consent. In so doing B commits a technical trespass. A's right of property has been violated; he has sustained a legal injury; but all men would agree that he has sustained no actual damage. An injury does frequently result in damage, and, when damage results, damages may be recovered as compensation; but, as will later appear, damages may be recovered wherever a legal injury has

(1) Stallings v. Corbett, 2 Spears (S. C.) 613.
(1a) Weeks v. Town of Shirley, 33 Me. 272.
(1b) Hitch v. Edgecombe Co. Com'rs, 132 N. C. 573.

occurred, although in the particular case no damage whatever has been sustained. In the case put, A's right of recovery is just as clear as it would have been had B thrown down the fence enclosing the feed-lot; the only difference would be in the amount of damages recovered.

§ 3. **Damnum absque injuria—"damage without injury."** It is an ancient and elementary rule of the common law that for damage without injury no action for damages may be maintained. In the celebrated case of the Gloucester Grammar School (1c), decided in 1410, we find an early illustration. Plaintiffs were two masters of a grammar school at Gloucester and had enjoyed a monopoly of the business of teaching the children of the town. Defendant started a rival school. As a result of his competition, the masters who as monopolists had received forty pence per quarter for each child now got but twelve pence. The plaintiffs relied upon this very substantial damage as a ground of action, but they failed because they could not show a legal injury. Said one of the judges: "There may be damnum absque injuria. As if I have a mill, and my neighbor builds another mill, whereby the profit of mine is diminished, I shall have no action against him; still I am damaged." Damage to another's person inflicted in self-defense, the destruction of property to prevent the spread of fire, and damage resulting from inevitable accident, are familiar illustrations of the same principle.

§ 4. **Injuria sine damno—"injury without damage."** Since the basic idea of damages is compensation for a

(1c) Anon. Y. B. 11 Henry IV, fol. 47 pl. 21.

loss or damage sustained, it is natural to assume that, unless there is an actual loss or damage sustained, no damages may be recovered. And this has sometimes been laid down as a rule. But there is no such rule. The true doctrine was well expressed by Judge Story in a dictum in a leading case (1d). Plaintiff and defendant each owned mills and mill privileges upon a certain river dam. To supply water for one of its mills, defendant diverted water from the river above plaintiffs' mills. Plaintiff brought a bill in equity to restrain this diversion. Defendant contended that plaintiff could not maintain an action at law without proving actual damage, and that therefore an injunction should not issue in the absence of such proof. While denying that the propriety of an injunction depended upon plaintiff's ability to maintain an action at law, the learned judge took the ground that an action at law might be maintained upon showing that the diversion was contrary to the plaintiff's right, and without showing the presence of actual damage. He said:

"I can very well understand that no action lies in a case where there is damnum absque injuria; that is, where there is damage done without any wrong or violation of any right of the plaintiff. But I am not able to understand how it can correctly be said, in a legal sense, that an action will not lie even in case of a wrong or violation of a right, unless it is followed by some perceptible damage, which can be established as a matter of fact; in other words that injuria sine damno is not actionable. . . . On the contrary, from my earliest reading, I have

(1d) Webb v. Portland Mfg. Co., 3 Sumn. 189.

considered it laid up among the very elements of the common law that wherever there is a wrong there is a remedy to redress it; and that every injury imports damage in the nature of it; and, if no other damage is established, the party injured is entitled to a verdict for nominal damages."

§ 5. **Damage sometimes an essential element of an injury.** We have seen that when a legal injury has occurred the presence of actual damage is not essential to the recovery of damages. In such a case the extent of actual damage is important only as a basis for determining the *amount* of damages to which the party injured is entitled as a fair compensation. But this assumes the existence of a legal injury. In some cases a legal injury is complete without the occurrence of actual damage; thus it is always actionable to break a contract, to publish a libel, or to make an unauthorized entry upon another's real property, although no damage whatever ensue. In other cases the law does not protect the particular right so jealously, or condemn the particular act so vigorously; it may be said to look upon the doing of the act with disfavor and to stand ready to treat it as an injury the instant it causes damage, but, unless damage appears, no injury is made out. To illustrate: A negligently fires a gun in the direction of B; B escapes unharmed; he can maintain no action against A; negligence without damage is not actionable; but, if the ball had inflicted a slight flesh-wound, or even torn his coat, his right to maintain an action would be clear. Again M makes a false statement to X with regard to an existing fact; he knows that

his statement is false and he makes it with the intention of inducing X to act upon it; X does act upon it, but sustains no perceptible damage in so doing; notwithstanding the deception X can maintain no action; if, however, X's reliance upon M's statement causes him appreciable damage, the law regards him as having sustained an injury and allows him to maintain an action for deceit. The law of libel and slander furnishes us with another illustration of the same principle. Libel or written defamation is always actionable without regard to damage; some forms of slander or oral defamation are actionable per se; but, in the ordinary case, it is necessary to show that the slanderous words spoken have resulted in a particular kind of actual damage—a temporal loss must be shown.

§ 6. **Place of damages in the law.** Thus it appears that wherever a legal right has been invaded the law stands ready to vindicate that right by awarding at least nominal damages to the injured party. The invasion of a legal right may or may not involve the infliction of actual damage. The question, whether a right has been invaded, and, therefore, whether any damages whatever may be recovered, is strictly speaking no part of the law of damages; it obviously belongs to the law of rights. Assuming that a right has been violated, and that some damages are therefore recoverable in a particular case, we go to the law of damages to find how much damages may be recovered. It is with the principles determining the measure of damages that we are concerned in this article.

Section 2. Respective Functions of Court and Jury in Awarding Damages.

§ 7. **Damages estimated by jury under instructions of court.** A judgment for damages is necessarily an act of the court; but everybody knows that the amount of damages recovered is ordinarily determined by a jury, upon whose verdict the judgment is based. It is also a matter of common knowledge that the court instructs the jury as to the law governing the assessment of damages in the particular case. The question naturally arises: upon what principle is this responsibility divided? The answer is simple. The function of the court is to decide questions of law; the function of the jury is to decide questions of fact. Since compensation is the basis of damages, the ultimate question, in the ordinary case, is, what is a fair compensation to the plaintiff? This obviously involves a question of fact; it can be answered only in view of all the facts and circumstances of the case. It is therefore a question for the jury. But, in considering these facts and circumstances, the jury are not at liberty to follow their caprice, nor indeed to rely wholly upon their own sense of fairness; the law has prescribed rules for their guidance, and the court, as the mouthpiece of the law, must declare these rules in the form of instructions.

§ 8. **Extent of jury's discretion.** At this point a further question presents itself. How far does the court go in instructing the jury: does it endeavor to formulate definite tests, which, if faithfully followed, must lead to the same conclusion, by whatsoever jury they may be ap-

plied; or is it content with vague, general rules, leaving a wide margin of discretion to the jury which must apply them? The answer is that the amount of discretion allowed the jury depends upon the nature of the injury for which damages are sought. Formerly there was little attempt to limit the discretion of the jury, but nowadays the tendency is to control that discretion as far as practicable. The jury's discretion is widest in those cases in which exemplary or punitive, as distinguished from compensatory, damages may be imposed; it extends to determining whether they shall or shall not be assessed, and to fixing the amount, which may be as great as the jury deem just, subject only to the limitation imposed by what is reasonable. In assessing compensatory damages, different considerations prevail. In some cases, the damage to be compensated is capable of precise measurement; in those cases the jury must follow precise rules. If A owes B $100 and fails to pay when it is due, B's damage is obviously capable of estimation in terms of money, and there is no reason why the jury should have any discretion in assessing B's damages. If, however, A's default consists in failing to perform a contract, whereby he has agreed to work for B a definite time, it is plain that the jury must have a measure of discretion; men will differ in opinion as to the extent of B's damage, and some latitude must be given to the jury. Now suppose that A's wrong consists in injuring B's reputation by slander, in depriving him of his liberty by false imprisonment, or in inflicting upon him a serious personal injury, like the loss of an arm or an eye or the derange-

ment of his nervous system; how shall the court lay down a rule for estimating the damages? Here it is obvious that the only practicable rule is to allow the jury very great freedom; common sense, applied to the circumstances of the particular case, will be the safest guide. Thus we see that the inherent differences in the various forms of injury necessitate a corresponding variation in the extent of control exercised by the court over the jury in various cases. In no case, however, may the jury act arbitrarily. Be the court's instructions vague or definite, it is the jury's duty to follow them.

§ 9. **Excessive damages.** That a verdict for damages in an amount materially in excess of what could reasonably be assessed, in view of the facts and the law applicable thereto, would result in substantial injustice, if given effect by the judgment of the court, is too clear for discussion. In such a case the court will either set the verdict aside or remit the excess. When the injury is such that the damages can be estimated by pecuniary standards, as in the case of a contract to pay money or to deliver goods of a fixed market value, the court has little hesitation in interfering with the verdict; but, where the jury has a certain amount of discretion, the court has a corresponding amount of hesitation. And where the jury's discretion is widest the court's hesitation is greatest. In no case, where the jury has a discretion, will the court disturb the verdict simply because the judge would have awarded a lesser sum had he been called upon to exercise his own judgment in fixing the amount; the verdict must stand, unless it appears to him that the

jury's discretion has been abused. In a leading case (1e) in which defendant sought to have a verdict for damages for a personal injury set aside, on the ground that the amount was excessive, the court said: "In all cases where there is no rule of law regulating the assessment of damages, and the amount does not depend on computation, the judgment of the jury and not the opinion of the court is to govern, unless the damages are so excessive as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case." Acting under this rule courts have refused to interfere with verdicts for such amounts as $4,500 for loss of an arm (2), $10,000 for loss of a foot (3), $9,000 for total loss of vision (4), and $30,000 for total disability (5). And yet, where the court, after making every allowance for the discretion of the jury, is convinced that the damages assessed are manifestly exorbitant, it will not hesitate to set the verdict aside, or, as an alternative in some jurisdictions, to reduce the damages for which the plaintiff may take judgment. Thus, where a jury had assessed damages in the sum of $5,200 against a telegraph company for publishing a libel, but it appeared that the sole publication was to defendant's own agent, the court set the verdict aside as "simply farcical," and to be accounted for only on the ground that it was the result of

(1e) Worster v. Proprietors of Canal Bridge, 16 Pick. 541.
(2) Mo. Pac. R. Co. v. Tex. Pac. R. Co., 41 Fed. 316.
(3) Bowers v. U. P. R. Co., 4 Utah, 215.
(4) Stearns v. Reidy, 135 Ill. 119.
(5) Smith v. Whittier, 95 Cal. 279.

passion and prejudice (6). On the same principle courts have set aside, as excessive, verdicts for such amounts as $10,000 for loss of an arm (7), $25,000 for loss of a leg (8), and $37,500 for total loss of vision (9). Since the problem of the court in these cases is to determine just when to draw the rein upon the jury's discretion, we might well expect and do actually find verdicts upheld by some courts, and similar verdicts set aside by others.

§ 10. Inadequate damages. If the defendant may have the verdict set aside when the damages assessed are manifestly excessive, it follows that the plaintiff should have it set aside when they are manifestly inadequate. That such is the law is well settled. So long as there is a real doubt as to the extent of the damage which has been caused by defendant's breach of duty, it will be difficult for the court to say that the damages are inadequate. Thus, where plaintiff brought an action to recover damages for a personal injury caused by defendant's negligence, but there was conflicting testimony as to the extent of her injuries, and some evidence that a part of the pain and disability from which she suffered was attributable to previous ill health, the court refused to set aside as inadequate a verdict for $167 (10). But, where there is no question arising on the evidence as to the extent of the damage caused by defendant, and the question is purely one of compensation, the court dis-

(6) Peterson v. W. U. Tel. Co., 65 Minn. 18.
(7) Ill. Cent. R. Co. v. Welch, 52 Ill. 183.
(8) Tully v. Steamship Co., 10 N. Y. App. Div. 463.
(9) Deep Min. Co. v. Fitzgerald, 21 Colo. 533.
(10) Robinson v. Town of Waupaca, 77 Wis. 544.

turbs verdicts for inadequate damages on the same principle that it interferes when the damages assessed are excessive. To be sure courts are not often called upon to exercise this power, for juries are not prone to underestimate damages, but there are numerous instances of its exercise. Here, as in the case of excessive damages, the task of the court is not difficult when the damage admits of measurement by pecuniary standards. Thus, a verdict for one-fourth of the proved value of horses killed by the defendant's negligence is obviously inadequate and is set aside without hesitation (11). But the courts are exceedingly slow to act in these cases where the jury have a large discretion. Thus, it is said that the amount must be placed so low as to show that the jury have acted from "passion or prejudice" (12) or "under the influence of a perverted judgment" (13). But that they do act, even in this class of cases, is clearly shown by a recent case (14) in which a verdict for $100 for serious personal injuries was set aside by the trial court as inadequate. In upholding the action of the lower court the supreme court said:

"It seems to have been thought by some courts that the general supervisory power over verdicts, where the amount is not capable of computation and rests in the sound discretion of the jury, should not be exercised where the verdict is for too small an amount. No such limitation on the supervisory power of the trial judge has been

(11) Smedley v. C. & N. W. Ry. Co., 45 Ill. App. 426.
(12) Boggess v. Met. St. Ry. Co., 118 Mo. 328.
(13) Robinson v. Town of Waupaca, 77 Wis. 544.
(14) Tathwell v. City of Cedar Rapids, 122 Iowa, 50.

definitely established, and, by the great weight of authority, both in England and America, the power to set aside the verdict when manifestly inconsistent with the evidence, and the result of a misconception by the jury of their powers and duties, is as fully recognized where the verdict is inadequate as where it is excessive; and ample illustration of the exercise of this power is found in actions to recover damages for personal injuries or injury to the reputation, although in such cases the amount of damages is peculiarly within the jury's discretion."

CHAPTER II.

NON-COMPENSATORY DAMAGES.

Section 1. Nominal Damages.

§ 11. **General theory.** In the early days of the common law damages were awarded only when actual, appreciable damage had been inflicted; but nowadays a plaintiff may recover a trifling sum, e. g., a farthing, a sixpence, or a dollar, whenever his legal right has been invaded. The allowance of nominal damages results from a sort of procedural necessity. It is often important that rights be adjudicated and established, although no real harm or damage may have resulted from their violation. Furthermore, it is a maxim of the law that wherever there is a right there is a remedy. We have already seen that the normal remedy afforded by a court of law is a judgment for damages. Hence, if the plaintiff's right appears to have been violated without the infliction of measurable damage, the natural remedy and the simplest method of vindicating the right is to award a judgment for nominal damages. The right involved, perhaps a title to real estate, is thereby declared and finally adjudicated, without at the same time unjustly burdening the defendant. But the notion that damage is the basis of damages is so firmly imbedded in the law, that the courts have resorted to a legal fiction and are wont to say that every legal

injury "imports" damage. An extract from the leading case of Ashby v. White (1), shows the theory usually adopted by the courts. In that case, a qualified voter had been prevented by an officer from giving his vote at an election for a member of parliament. Said Lord Holt: "I am of opinion that this action on the case is a proper action. My brother Powell, indeed, thinks that an action on the case is not maintainable, because there is no hurt or damage to the plaintiff; but surely every injury imports a damage, though it does not cost the party one farthing, and it is impossible to prove the contrary; for a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right."

§ 12. **Nominal damages recoverable for every breach of contract.** Whenever a man breaks a contract, he violates the legal right of the other contracting party, and therefore lays himself liable to an action in which at least nominal damages may be recovered. Thus, where plaintiff, in an action for wages on a contract for services, showed that he had rendered services, but failed to prove their value, the court held that he was entitled to recover nominal damages (2). In another case (3) defendant complained of the refusal of the trial court to instruct the jury that plaintiff could not recover in an action for breach of contract, without showing that he had been damaged by defendant's breach. The appellate court held that the refusal was entirely proper and said: "In actions for breach of contract, nominal damages are pre-

(1) 2 Ld. Raym. 938.
(2) Owen v. O'Reilly, 20 Mo. 603.
(3) Browner v. Davis, 15 Cal. 9.

sumed to follow as a conclusion of law from proof of the breach."

§ 13. **Nominal damages recoverable for every tort.** The right violated may not arise out of contract at all; it may be a right which the plaintiff enjoys as a member of society, and quite apart from any contractual relations between him and the defendant—in other words, one of the so-called "tort rights"; but, from what has been said, it is plain that on principle nominal damages should be allowed for the infringement of such a right. And so the cases hold. Defendant commits an assault and battery upon the plaintiff; in so doing he violates the plaintiff's right of personal security. For the vindication of this right the law awards nominal damages, although no actual damage is proved (4). On the same principle, the infringement of one's right of personal liberty, by a false arrest, entitles him to nominal damages, although no damage results from the arrest (5). The right of private property is often thus recognized. It is held that the slightest trespass upon real property gives rise to an action for nominal damages (6). And the wrongful taking of plaintiff's goods entitles him to nominal damages, although the property taken has been returned and he has sustained no appreciable damage (7). A leading case is Wood v. Waud (8). As an incident to his right of property in a tract of land, plaintiff had a right to use

(4) Lewis v. Hoover, 3 Blackf. 407.
(5) Lewis v. Clegg, 120 N. C. 292.
(6) Dixon v. Clow, 24 Wend. 188.
(7) Cernahan v. Chrisler, 107 Wis. 645.
(8) 3 Exch. 748.

the waters of a natural stream. Defendant and others had mills on the stream above plaintiff's land, and their milling operations fouled the waters of the stream. It was held that plaintiff might recover nominal damages, although the other mill-owners had so fouled the stream above defendant's mill that the additional pollution by the defendant caused plaintiff no additional damage.

§ 14. **Nominal damages recoverable despite actual benefit from the legal injury.** That nominal damages are awarded, not as compensation, but in recognition of a legal right, is forcibly shown by those cases which hold that nominal damages may be recovered, even where the violation of the plaintiff's right has resulted in an actual benefit to him. Such a case is Carver v. Taylor (9). There the plaintiff had agreed to buy of the defendant, at a stipulated price, certain real estate which the defendant was to convey at an agreed time. Defendant failed to perform his contract. At the time he should have conveyed the land, its value was much less than the price the plaintiff had agreed to pay. Had defendant performed his contract, plaintiff would have been obliged to pay the contract price. That he was benefited by defendant's default is obvious; but the court held that plaintiff was entitled to nominal damages.

§ 15. **Nominal damages recovered where no proof of substantial damage.** It has been said that originally no damages could be recovered unless actual, appreciable damage was proved. The modern law of damages is built upon the basis of compensation for damage sus-

(9) 35 Neb. 429.

tained. It is still true that substantial damages cannot be recovered, unless substantial damage is shown. Injury without damage limits the plaintiff's recovery to nominal damages, at the same time that it makes them recoverable. Two cases will illustrate the principle. In Merrill v. Western Union Tel. Co. (10), damages were sought for the inexcusable non-delivery of a telegram, whereby the plaintiff was prevented from performing his contract to labor, but, as it appeared that the contract was determinable at the will of either party, the plaintiff failed to show substantial damage. The court said: "The plaintiff must prove his damages before they can be assessed. The case fails to show facts that warrant greater than nominal damages." In Leeds v. Metropolitan Gaslight Co. (11), plaintiff sought to recover for loss of time occasioned by defendant's negligence, but failed to give any evidence from which the value of the time lost could be inferred. The court held that he could not recover substantial damages and said: "The rule of recovery is compensation. When a loss is pecuniary, and is present and actual and can be measured, but no evidence is given showing its extent, or from which it can be inferred, the jury can allow nominal damages only."

Section 2. Exemplary Damages.

§ 16. **In general.** We have already seen that nominal damages constitute an exception to the general rule that damages are awarded as compensation for actual damage sustained. Exemplary damages form another exception to

(10) 78 Me. 97.
(11) 90 N. Y. 26.

that rule. Just as nominal damages are awarded, where there is no actual damage to compensate, and in recognition of a right that has been infringed, so exemplary damages are awarded in certain cases, in addition to compensation, as a punishment to the defendant and an example to others. In the words of an eminent writer: "Wherever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy, the law, instead of adhering to the system or even the language of compensation, adopts a wholly different rule. It permits the jury to give what it terms 'punitive,' 'vindictive,' or 'exemplary' damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender" (12). The theory adopted by the courts in allowing exemplary damages is well brought out in Sheik v. Hobson (13). A statute had provided that all causes of action should survive the death of the person liable, and might be brought against his personal representative. Under this statute, plaintiff, in an action for slander, claimed exemplary damages from the administrator of the deceased wrong-doer. This squarely raised the question as to whether they could be recovered as a right incident to the cause of action. Speaking through Reed, J., the court said:

"It cannot be said, in any case—unless the right is created by statute—that the person who suffers from the wrongful or malicious acts of another, has the right to

(12) 1 Sedgwick on Damages, p. 38.
(13) 64 Iowa, 146.

have vindictive damages assessed against the wrong-doer. Such damages are awarded as a punishment of the man who has wickedly or wantonly violated the rights of another, rather than for the compensation of one who suffers from his wrongful act. It is true, they are awarded to the one who has been made to suffer, but not as a matter of right; for, while he is entitled, under the law, to such a sum as will fully compensate him for the injury sustained, the question whether punitory damages shall be assessed and the amount of the assessment, is left to the discretion of the jury. Plaintiff had a right of action, on account of slanderous words spoken by Rush, for such sum as would compensate her for the injury. This was her cause of action, and this is what was preserved to her by the statute at his death. But she had no personal interest in the question of his punishment. So far as he was concerned, the punitory power of the law ceased when he died. To allow exemplary damages now, would be to punish his legal and personal representatives for his wrongful acts; but the civil law never inflicts vicarious punishment."

§ 17. **Doctrine of exemplary damages criticised.** Although supported by the great weight of judicial authority the doctrine has met with strong opposition. It has been condemned as "interjecting into a purely civil action the elements of a criminal trial, intermingling into a sort of medley or legal jumble two distinct systems of judicial procedure." From the standpoint of legal theory it must be admitted that there is something in the objection. If it be denied that plaintiff has a right to recover

exemplary damages, their recovery by him as a matter of the jury's discretion seems anomalous. If it be affirmed that they are assessed as a punishment of the defendant, it seems equally anomalous to allow the penalty to be fixed by the discretion of a jury, after a trial in which the time-honored rule of proof in criminal cases, beyond a reasonable doubt, has yielded to proof by preponderance of testimony, and in which the defendant has perhaps been compelled to testify against himself. The practice of allowing exemplary damages is to be justified, if at all, by its practical results, rather than by its theoretical blending of the interests of society and of the individual. As a matter of fact, it is probable that in the long run substantially the same results are reached by juries in those jurisdictions which repudiate exemplary damages, as in those jurisdictions which uphold them; for all of them give the jury wide discretion in assessing compensatory damages for mental suffering, injured feelings, insults, indignities, sense of shame, and humiliation endured, and it is obvious that such consequences would ordinarily follow from the very class of wrongs for which exemplary damages are elsewhere allowed. With free rein to assess damages under those heads, it is doubtful if juries often give smaller verdicts simply because they cannot assess exemplary damages as such.

§ 18. **Exemplary damages within jury's discretion.** As we have already seen, exemplary damages are not recoverable as a matter of right, and their allowance rests within the discretion of the jury. It is error for the court to instruct the jury that it must or even ought to

assess exemplary damages in any case. Its powers are exhausted in passive permission or actual restraint. It should never direct the jury to award exemplary damages, but should instruct it as to when it may properly do so, and as to when its discretionary power may not be exercised. Thus, a court may properly instruct a jury that "insult, indignity, oppression, or inhumanity" will be sufficient to authorize a finding of exemplary damages, but it may not properly instruct the jury that "indecorous conduct" will warrant such a verdict (14). And here, as in other cases of discretionary damages, the court may interfere if the amount allowed is unreasonably excessive.

§ 19. **Exemplary damages practically restricted to tort actions.** That a contract may be broken with malicious motives, and under circumstances which make the breach insulting or oppressive, is clear to everyone, and, if punitory damages were applicable to actions on contract, it is probable that they would not infrequently be assessed in such actions; but their allowance has been restricted, as a general rule, to tort actions of a quasi-criminal character. To this rule there is a well-founded exception: in actions for breach of promise of marriage, it is held that vindictive damages may be assessed, if the jury consider defendant's conduct so reprehensible as to warrant punishment (15).

§ 20. **Against whom exemplary damages are recoverable.** If exemplary damages are really punitory in character, and their recovery is allowed as a punishment for

(14) Louisville & N. R. Co. v. Ballard, 85 Ky. 307.
(15) Southard v. Rexford, 6 Cowen, 254.

malicious, wanton, or reckless conduct, it logically follows that they should be allowed only where the defendant has himself been guilty of such misconduct, either directly or indirectly. If he has committed a brutal assault and battery; if he has deliberately defrauded the plaintiff of property; if he has knowingly and maliciously made slanderous or libelous statements attacking the plaintiff's character; if he has by wanton or reckless misconduct, showing utter indifference to the plaintiff's safety, inflicted a serious personal injury upon him; in these and many other cases which might be put, the occasion for exemplary damages is manifest. Or, if he has indirectly been guilty of such misconduct, by expressly directing or authorizing an agent or servant to engage in it, the propriety of such punishment is equally manifest. So, too, where his agent or servant has been guilty of such misconduct, and he has afterwards adopted and ratified it as his own. In these cases his moral obliquity is as clear as though he had himself been an active wrong-doer, and he is therefore held liable for exemplary damages. There is also little hesitation in visiting this penalty upon the defendant, when he has exercised gross negligence in selecting his personal representative, or where he has entrusted his business wholly to an agent without supervision or control, and thereby evinced an intent to become fully responsible for his acts.

§ 21. **Same: Against innocent principal for acts of agent.** But a serious problem arises in those cases in which none of these elements is present, and where the sole ground of liability is that the act was done in the

scope of an agent's authority or within the course of a servant's employment, as those terms are defined by the law. In such cases the liability of the defendant principal or master to make full compensation for all actual damage is unquestioned; but there is utterly lacking that moral delinquency, that quasi-criminal mind, which make punitive damages have a place in the law; and, therefore, many courts hold that the defendant's liability does not extend beyond the payment of compensatory damages (16). However, many courts do not regard this absence of personal guilt in the principal or master as decisive. They hold that the general principle of responsibility for the acts of an agent or servant, done in the course of employment, applies as well in the allowance of exemplary damages as in the assessment of compensation (17). Some courts have shown a tendency to give great weight to considerations of public policy in applying the law to particular classes of cases. Thus, it has been urged that private corporations ought to be liable in exemplary damages for the acts of their employes, on the theory that, as corporations can act only through agents or servants, they would otherwise be practically immune from the operation of the law so far as exemplary damages are concerned (18). There is a distinct tendency toward greater strictness in the case of railway corporations, on the ground that it is the policy of the law to encourage great care in the selection of railway em-

(16) Lake Shore & M. S. Ry. v. Prentice, 147 U. S. 101.
(17) Rucker v. Smoke, 37 S. C. 377.
(18) Goddard v. Grand Trunk Ry. of Canada, 57 Me. 202.

ployes (19). On the other hand, municipal corporations are, for reasons of policy, generally considered as peculiarly exempt from liability for exemplary damages, although they, as well as private corporations, must necessarily act through agents or servants (20).

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(19) Lienkauf v. Morris, 66 Ala. 406.

(20) City of Chicago v. Langlass, 52 Ill. 256.

CHAPTER III.

COMPENSATORY DAMAGES: PRELIMINARY CONSIDERATIONS.

§ 22. **In general.** Were the remedial powers of a court of law restricted to the awarding of nominal damages in technical recognition of a legal right, and to the imposition of exemplary damages in punishment of a quasi-criminal tort, its inefficiency as an instrument of justice would be apparent at a glance. When a plaintiff goes into a court of law with a prayer for damages, he ordinarily seeks neither the mere recognition of a right nor the punishment of the defendant; what he asks is substantial damages for substantial harm, pecuniary indemnity for actual damage caused by defendant's breach of duty. If the damages allowed by the court are to amount to a remedy at all, it is evident that they must have a relation to this damage and indeed be commensurate with it. And such indemnity the law stands ready to grant. The basic idea of the law of Damages is compensation. Its great purpose is fully to compensate the plaintiff by damages that shall at the same time be just to the defendant. It is therefore with the principles and rules governing the assessment of compensatory damages that the law of Damages is mainly concerned. This branch of the law starts with the assumption that a breach of duty

by the defendant, constituting a violation of plaintiff's legal right, has already occurred. It may have occurred as a tort or as a breach of contract. In either case our problem is: how shall the plaintiff be fully and fairly compensated?

Section 1. Liquidated Damages.

§ 23. **Liquidated damages defined.** Ordinarily the question as to what constitutes proper compensation is answered by the jury, under the instructions of the court; but in some cases the court holds that this question has been answered by an agreement of the parties themselves, in anticipation of a possible breach of duty by one of them. For reasons not here necessary to state, these cases are confined to actions on contract. Frequently a contract contains a provision that, in the event of its breach, a certain sum shall be paid as damages. Sometimes such a provision has the effect of conclusively fixing the compensation to be paid by the defaulting party in case of a breach. When it has such an effect, the damages are said to be liquidated. When the damages are liquidated, no question of compensation is left for the jury; assuming a breach of the contract, the plaintiff's recovery of liquidated damages follows as a conclusion of law.

§ 24. **Distinguished from a penalty.** But not all such provisions have this effect. Frequently the court holds that such a provision is in the nature of a penalty. The word "penalty," as used in this connection, has a special meaning very different from its ordinary import. This meaning will appear from a brief account of the instru-

ment known as the penal bond. Formerly interest was not recoverable upon money due. If the debtor had use for his money, he would naturally be tempted to postpone the payment of his debt. For the protection of the creditor, it is supposed (1), an instrument was devised by which a party bound himself to pay a sum of money or do a certain act by a certain day, or in default thereof to pay a certain sum of money by way of penalty. The original idea was to penalize the non-performance of an obligation. This was accomplished by making the amount of the penalty excessive, when viewed from the standpoint of compensation. Thus a debt for £50 would be secured by a penalty of £100. As the law courts rigidly enforced these penalties, great hardship was frequently occasioned. In consequence, equity began to relieve obligors from the burden of such penalties. After a time, the law courts found a way to follow the lead of the equity courts in this practice. As a result, the penalty of the penal bond became a penalty in name only, serving in reality to mark the limit of the plaintiff's recovery; within this limit damages were allowed to the extent of adequate compensation only. In modern penal bonds and in statutory undertakings, such as attachment, injunction, and official bonds, the penalty marks the limit beyond which the liability of the bondsman for compensatory damages will in no case extend. In the case of an ordinary contract, the fixing of a penalty for its breach apparently has no effect at all, so far as the substantial rights of the parties are concerned; when a breach occurs compensation may

(1) See Sedgwick's Elements of Damages (1st ed.), p. 216.

be had upon the principles usually applicable in assessing damages for breach of contract, be the amount thus recoverable greater or less than the penal sum named in the contract broken.

The practical importance of the distinction between a penalty and liquidated damages now appears. The former has no effect in determining the amount recoverable in an action on an ordinary contract; the latter fixes that amount absolutely. In a particular case, it may turn out that a sum named by the parties as damages in case of a breach is considerably in excess of what a jury would probably assess, if the matter were submitted to them. In such a case the defendant's interest would obviously be furthered by holding the sum named to be a penalty only, thereby leaving the question of compensation to be settled by the jury. Conversely, the plaintiff's interest would be furthered by holding the sum named to be liquidated damages, thereby taking the question from the jury and allowing the full sum as the plaintiff's legal right. The conflict of opposing interests at this point has been a fruitful source of litigation. The law of liquidated damages consists chiefly of the principles and rules which guide the courts in deciding whether a particular sum named by the parties as damages shall be treated as liquidated damages or as a penalty only.

§ 25. **Principal considerations in determining whether damages are liquidated: Stipulation penal.** It is often said that in determining whether a sum, which contracting parties have declared payable in the event of a breach, is to be deemed a penalty or liquidated damages, the gen-

eral rule is that the intention of the parties governs. Indeed cases are usually decided upon the basis of what the intention of the parties must be "presumed" to have been. In arriving at this presumed intention, however, a court will not hestitate to override the actual intention as expressed by the parties themselves, whenever an adherence to the expressed intention would clearly work injustice. Thus in Kemble v. Farren (2), a leading case, the court held a particular sum to be a penalty although the contract expressly declared this sum to be "liquidated and ascertained damages, and not a penalty or penal sum or in the nature thereof." In another leading case (3), which professes to follow the general rule, it is said:

"The agreement will, however, be ascertained by considering, not only particular words in their contract, but the whole scope of their bargain, including the subject to which it relates. If on such consideration, it appears that they have provided for larger damages than the law permits, e. g. more than the legal rate for the payment of money, or that they have provided for the same damages on the breach of any one of several stipulations, when the loss resulting from such stipulations clearly must differ in amount, or that they have named an excessive sum in a case where the real damages are certain, or readily reducible to certainty by proof before a jury, or a sum which it would be unconscionable to award—under any of these conditions the sum designated is deemed a penalty. And, if it be doubtful, on the whole agreement,

(2) 6 Bing. 141.
(3) Monmouth Park Ass'n v. Wallis Iron Works, 55 N. J. L. 132.

whether the sum is intended as a penalty or as liquidated damages, it will be construed as a penalty, because the law favors indemnity."

From this enumeration of the conditions under which a sum named as damages will be held to constitute a penalty, regardless of the language of the parties, it is evident that the intention of the parties will be practically disregarded in those cases where, to carry it out, would be to contravene the principle of compensation.

§ 26. **Same: Stipulation valid.** In a case where the parties have simply tried to substitute their own judgment for that of the jury upon the question of compensation, and their agreement is reasonably consistent with the principles of indemnity, there is an obvious advantage in carrying out their expressed intention; for such a course will save time and expense and avoid the uncertainty of a verdict. In Jaquith v. Hudson (4), a leading American case, the parties had been partners in a mercantile establishment. In the contract of dissolution, one of them agreed not to engage in the mercantile business in the village in which the partnership business had been carried on, for a period of three years, "upon the forfeiture of the sum of $1,000" to be paid "as damages." The court held that this stipulation amounted to liquidated damages. Said Christiancy, J., in giving the reasons for the decision:

"But, secondly, there are great numbers of cases, where, from the nature of the contract and the subject-matter of the stipulation, for the breach of which the sum

(4) 5 Mich. 123.

is provided, it is apparent to the court that the actual damages for a breach are uncertain in their nature, difficult to be ascertained, or impossible to be estimated with certainty, by reference to any pecuniary standard, and where the parties themselves are more intimately acquainted with all the peculiar circumstances, and therefore able to compute the actual or probable damages, than courts or juries, from any evidence which can be brought before them. In all such cases, the law permits the parties to ascertain for themselves, and to provide in the contract itself, the amount of the damages which shall be paid for the breach. In permitting this, the law does not lose sight of the principle of compensation, which is the law of the contract, but merely adopts the computation or estimate of the damages made by the parties, as being the best and most certain mode of ascertaining the actual damage or what sum will amount to a just compensation."

Section 2. Certainty in Proving Damage.

§ 27. **In general.** Even though the damages have not been liquidated by the parties, the case will occasionally be so clear under the law as to warrant the court in taking the question of compensation from the jury, as for instance, in an action upon a promissory note; but, as a general rule, that question is for the jury to answer, after considering the evidence under the instructions of the court. The plaintiff is entitled to full indemnity for all the damage to which defendant's responsibility extends; but, in order to obtain compensation for any item of damage, he must prove to the jury that he has sustained that damage. This of course he does by submitting evidence.

But in the submission of evidence he is controlled by the court, and the court must see that the rules of evidence are followed. These rules exclude merely speculative or hypothetical matters from the consideration of the jury, and require that the evidence presented shall be reasonably certain in its nature. Accordingly, only those items of damage which are susceptible of certainty in proof may be compensated by damages. As the rule is loosely put, "damages must be certain."

§ 28. **No damages allowed for loss of profits incapable of proof.** The rule of certainty is most frequently invoked when the question is as to the recovery of prospective profits. As we shall see, there is no general rule that the loss of anticipated profits will not be considered in computing damages, for such profits are sometimes capable of tolerably certain proof; but there is a rule that there can be no recovery for profits that are merely hypothetical or speculative in character, and are therefore wholly incapable of proof. A few cases will illustrate its application. In Greene v. Goddard (5), plaintiffs, commission merchants in China, drew bills upon defendant's account with a London firm, defendant agreeing that they should be paid at maturity. They were not paid until some time after maturity. For the loss of the use of money during the period of delay plaintiffs seek damages, claiming an allowance for the loss of profits which might have arisen from the use of the money but for defendant's default. In holding such profits to be incapable of proof the court said: "In the use of money, instead of realizing

(5) 9 Met. 212.

great profits, they might have encountered difficulties and sustained injuries unforeseen at the time, and have suffered like thousands of others. Theirs is not a *loss,* in the just sense of the term, but the deprivation of an opportunity for making money, which might have proved beneficial or might have proved ruinous; and it is of that uncertain character which is not to be weighed in the balances of the law, nor to be ascertained by well established rules of computation among merchants."

§ 29. **Same: Further illustrations.** In Wright v. Mulvaney (6), plaintiffs were fishermen. Defendant negligently ran into and injured their net with his steam-tug. On the trial it appeared that the net could have been repaired in ten days. Evidence was given as to plaintiffs' profits prior to the injury of the net, but no testimony was offered as to the conditions of successful fishing or the price of fish after the accident. Upon the basis of previous profits the jury assessed $200 damages for loss of profits during the ten days. Held, the allowance of this item was improper. After remarking upon the proverbial uncertainty of fishing, the court said: "Without any testimony concerning these essential conditions, the jury must have made their assessment of damages to plaintiffs' business largely upon conjecture." In Bernstein v. Meech (7), defendant agreed to provide an opera-house for the use of plaintiff's theatrical company, the gross receipts to be equally divided between plaintiff and defendant. Owing to defendant's breach of contract,

(6) 78 Wis. 89.
(7) 130 N. Y. 354.

the performances did not take place. With respect to the measure of damages in an action for this breach the court said in part: "The value of the contract to the plaintiff was in the profits, and in the amount of them which may have been realized over his expenses attending the performance. These profits, not being susceptible of proof, were not the subject of recovery."

§ 30. **Profits fairly susceptible of proof may be recovered.** The right to recover damages for profits lost does not wholly depend upon the rule of certainty, as will later appear; but, in so far as this rule furnishes an obstacle to the recovery of prospective profits, that obstacle is removed when the loss of profits may be proved with a reasonable degree of certainty. This will clearly appear from a few illustrative cases. In Aetna Life Ins. Co. v. Nexsen (8), plaintiff, an agent of defendant company, was discharged without cause before the expiration of the contract of agency. At the time of his dismissal he had secured policies upon which the annual premiums amounted to $8,000. By the terms of his contract a part of his compensation for policies secured was to be 5% of the annual renewal premiums thereon. Defendant contended that no allowance should be made for plaintiff's loss of anticipated income from probable renewals, on the ground of uncertainty. The court said: "It is also true that merely speculative or conjectural damages can not be recovered, but appellee's damages are not merely speculative. He had secured policies upon which there is a very strong probability that renewal premiums will be

(8) 84 Ind. 347.

paid. The act which secured the policies has been performed, and the policies are in existence. The basis of the right to damages exists; it is not to be built in the future. The only question for the future to solve is, how many policy-holders will renew and pay premiums? or how many policies will lapse? This probability, like all others of an analogous character, is to be determined upon evidence. Certainty is not attainable, but this may be said of all kindred questions. Because absolute certainty is not attainable is no reason for rejecting all claims to recovery."

§ 31. **Same: Further illustration.** In White v. Miller (9), plaintiffs were gardeners. Defendants were seedsmen. The former bought of the latter a quantity of seeds which defendants warranted to be Bristol cabbage seed. From this seed 105,000 plants were grown and set out, of which 100,000 lived. Of those which lived, only 200 produced Bristol cabbages; all the rest were of an inferior variety of no use except as food for cattle. Held, plaintiffs were entitled to recover the difference in value between the crop grown and that which would probably have been grown had the seed been as warranted. While declaring that the jury should not be allowed to consider "mere contingent or speculative gains or losses, with respect to which no means of ascertaining with any certainty whether they would have resulted or not," the court said in support of its position that plaintiffs' loss could in this case be established with sufficient certainty: "The character of the season, whether favorable or un-

(9) 71 N. Y. 118.

favorable for production; the manner in which the plants set were cultivated; the condition of the ground; the results observed in the same vicinity where cabbages were planted, under similar circumstances; the market value of Bristol cabbages when the crop matured; the value of the crop raised from the defective seed; these and other circumstances may be shown to aid the jury, and from which they can ascertain approximately the extent of the damages resulting from the loss of a crop of a particular kind."

§ 32. **Recovery of prospective damages depends upon certainty of proof.** In the case from which we have just quoted, the damage had all been sustained at the time the action was brought; the jury could take a retrospective view and assess the damages accordingly. But in the preceding case, Insurance Co. v. Nexsen, the damages could not be assessed without a look into the future. The plaintiff had lost his commissions upon probable renewals. These renewals would occur from time to time after the trial. It was a question of probability to be settled in the light of expert testimony. The recovery depended upon the possibility of establishing this probability with reasonable certainty. A sufficiently probable loss complies with the rule of certainty, as well as one which can be proved with reasonable certainty to have already occurred; in either case the plaintiff has been damaged. The principle is further illustrated by that numerous class of cases in which damages are allowed for probable future suffering. Thus in a New York case (10) it was

(10) Filer v. N. Y. Cent. R. Co., 49 N. Y. 42.

held proper for the jury to consider a physician's testimony as to the probability of the return of a muscular inflammation consequent upon plaintiff's injury by the defendant. The court said, in part: "The limit in respect to future damages is that they must be such as it is reasonably certain will inevitably and necessarily result from the injury."

§ 33. **Difficulty of measuring damage by monetary standards.** To recover for any damage sustained, the actual occurrence of such damage must be proved with reasonable certainty. When the damage is of such a character that it may be measured by pecuniary standards, the plaintiff must present evidence upon which to base such measurement. Accordingly a plaintiff was restricted to nominal damages for the loss of his time when he failed to give any evidence as to the value of his time (11). But where the damage is incapable of such measurement, recovery will not therefore be denied. This is well shown by those cases in which the damages are said to rest within the discretion of the jury. The difficulty of measuring physical pain and mental suffering in terms of money does not exclude them from consideration in estimating damages. These cases generally arise in tort; but the principle extends to contract. In a New York case (12) plaintiffs sued for breach of a contract in which defendants had agreed that plaintiffs should have the exclusive agency for the sale of a sewing-machine within certain territory. The lower court excluded evidence of

(11) Leeds v. Metrop. Gas L. Co., 90 N. Y. 26.
(12) Wakeman v. Wheeler & W. Mfg. Co., 101 N. Y. 205.

the value and profits of similar agencies in similar localities, offered for the purpose of showing the value of plaintiff's contract, on the ground that the profits lost by the breach of such a contract were necessarily speculative and imaginary. This the court of appeals held to be an error. Said Earl, J., in part:

"The damages must not be merely speculative, possible and imaginary, but they must be reasonably certain, and such only as actually follow or may follow from the breach of the contract. . . . They are nearly always involved in some uncertainty and contingency; usually they are to be worked out in the future, and they can be determined only approximately upon reasonable conjectures and probable estimates. They may be so uncertain, contigent, and imaginary as to be incapable of adequate proof, and then they cannot be recovered because they cannot be proved. But when it is certain that damages have been caused by a breach of contract, and the only uncertainty is as to their amount, there can rarely be good reason for refusing, on account of uncertainty, any damages whatever for the breach. A person violating his contract should not be permitted entirely to escape liability, because the amount of the damages which he has caused is uncertain."

§ 34. **Meaning of rule that law adopts most certain method of measuring damages.** It is often said that where an injury has occurred and several modes of estimating the damages present themselves, the law will adopt that mode which is most certain in character (13). This state-

(13) See Griffin v. Colver, 16 N. Y. 489, 495.

ment is apt to be misleading. We have already seen that full compensation means compensation for every item of damage, which can be proved with reasonable certainty to have been suffered. It matters not how many items there are; the law does not pick out those that are most certain and reject the others; it recognizes all that are sufficiently certain; compensation may be had for all that may be proved with reasonable certainty. On the other hand the rule clearly does not refer to the evidence by which the monetary equivalent of a proved damage is to be estimated. What then does it mean? It means simply this: in many cases different items of damage present themselves as possible bases of recovery; the law rejects those items that are uncertain and recognizes those that are certain. Thus, in Greene v. Goddard (§ 28, above) the court would not allow damages for the profits which might have been made out of the use of money, since they were merely conjectural; but it did allow compensation for the loss which was proved. By the non-payment of the bills plaintiffs lost the use of money. The use of money has a market value which is represented by the current rate of interest. This measure of damages was adopted by the court. In Wright v. Mulvaney (§ 29, above) the court denied compensation for profits lost by the interruption of plaintiffs' fishing—no evidence being offered to prove such loss—but it did allow compensation for all the loss which was proved, viz., the cost of repairing the net, the services required in resetting it, and the actual rental value of the net for the ten days required for restoration. In Bernstein v. Meech (§ 29) the plain-

tiff's loss was not confined to the profits which he might have derived from the performances of his theatrical company; his loss in part consisted of the expenses incurred in preparing and providing for the engagement. These expenses could be proved with certainty and for this loss compensation was allowed. Said the court: "While the plaintiff was unable to prove the value in profits of his contract, he was properly permitted to recover the amount of such loss as it appeared he had suffered by the defendants' breach."

Section 3. Singleness of Recovery.

§ 35. **In general.** It sometimes happens that the damage for which a party is entitled to compensation has been inflicted and suffered once for all; again, it may have been cumulative in character, resulting from a series of acts, or following one act in a series of consequences; still again, the damage may be in part a matter of anticipation, capable of proof with sufficient certainty, but not yet actually experienced. In such cases the question arises: when may the damages be assessed; must all be settled in one suit, or may actions be brought as the damage is suffered? From the standpoint of the law of Damages, the answer is simple. For a single cause of action all damages must be assessed in a single suit. The law will not permit an action to be split. But it is often a nice problem in the law of tort or contract to tell whether there is one action or more than one. That question settled, the rule of damages is that for each distinct cause of action all the damages incident thereto, whether for damage already suffered or sufficiently proved as a probable con-

sequence, must be recovered in one action if at all. Contrasted cases in tort and contract will illustrate this.

§ 36. **Application in tort: Trespass.** The operation of the rule in a personal injury case is simple. Thus, in a leading case (14), it appeared that plaintiff had sued defendant for an assault and battery and recovered damages therefor. Afterwards, as a result of the same battery, a piece of his skull came out. To recover for this damage he brought another action. The former recovery was successfully pleaded in bar. There was only one legal injury, one cause of action, the assault and battery. As to the injury to the skull the court said that must be deemed to have been taken into consideration as a probability, when the damages were assessed in the former action. The operation of the rule is equally simple when the question is as to recovery for damage resulting from a trespass upon realty. Thus, defendant wrongfully enters upon plaintiff's land and digs a ditch there. Against this trespass the statute of limitations runs. After the running of the statute plaintiff's land is flooded. It is conceded that defendant's act in digging the ditch caused the overflow. Plaintiff now sues, seeking damages for the flooding of his land. Recovery is denied. For defendant's trespass, plaintiff was entitled to one action only; in it he could have recovered for all prospective damages; the time for bringing that action has gone by; the recent flood was no new cause of action—it was simply damage resulting from the original trespass (15).

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(14) Fetter v. Beal, 1 Ld. Raym. 339, 692.

(15) Kansas Pac. Ry. v. Mihlman, 17 Kan. 224.

§ 37. **Same: Nuisance.** When, however, the action is for a nuisance, we are confronted with a different situation. A nuisance ordinarily results from acts done on defendant's own land; it becomes a wrong to plaintiff only when he sustains damage therefrom. Now since the damage to plaintiff results from the doing of acts, or the maintenance of a condition, upon defendant's own land, the defendant always has it within his legal right to cease doing the acts, or alter the condition of his premises so as to prevent further damage to plaintiff. Therefore, it is held by most courts that in such a case prospective damages should never be allowed. They contrast it with the case of trespass, where the defendant has no right to reenter the plaintiff's land and undo his wrong and cannot therefore be supposed to intend to do so. Thus, where defendant erected a building upon its own land with the roof sloping towards plaintiff's property and did not place proper troughs under the eaves, in consequence of which plaintiff's cellar was flooded, it was held that plaintiff could recover such damages only as accrued up to the bringing of the suit. Said the court: "There is a legal obligation to remove a nuisance, and the law will not presume the continuance of a wrong" (16). In that case the nuisance was in no sense permanent; it was a simple matter to place adequate eave-troughs on defendant's building. Where, however, the source of the damage is permanent in character, like a railway embankment for instance, some courts presume a continuance of the damage and allow damages accordingly (17).

(16) Joseph Schlitz Brewing Co. v. Compton, 142 Ill. 511.

(17) Stodghill v. C. B. & Q. R. R., 53 Iowa, 341.

§ 38. **Application in contract.** Damages for future loss in actions on contract are known as entire damages, the term prospective damages being more especially applied in actions of tort. They may be recovered whenever the breach is such as to warrant the plaintiff in treating the contract as at an end. Thus, where defendant had, in consideration of the conveyance of certain property, agreed to support the plaintiff during his life, but without excuse neglected and refused to provide support during a period of two years, it was held that the plaintiff was justified in treating the contract as at an end, and might therefore recover damages for the loss of future support (18). But, where the contract cannot be treated as finally broken, entire damages cannot be recovered. Thus, where defendant agreed not to set up the business of a grocer within certain limits in the city of Boston, the plaintiff, upon proving a breach of this contract, was denied recovery for future loss. The contract could not be treated as broken once for all; the defendant might stop carrying on his business at any time, when plaintiff's damage would necessarily cease (19).

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(18) Parker v. Russell, 133 Mass. 74.
(19) Powers v. Ware, 4 Pick, 206.

CHAPTER IV.

LIABILITY FOR CONSEQUENCES OF BREACH OF DUTY.

Section 1. In General.

§ 39. **Defendant must be responsible for damage claimed.** In discussing the subject of certainty in proving damage we have assumed, first, that the defendant has been guilty of a breach of duty toward the plaintiff; and, secondly that this breach of duty would make the defendant liable for the particular damage for which the plaintiff claims compensation, provided only that he can prove that he has suffered such damage. But it does not follow that, because the defendant has violated the plaintiff's right and the plaintiff has sustained a particular damage, the defendant is therefore liable for that damage. Perhaps the damage was inflicted by some third person for whose conduct the defendant is not responsible; perhaps it is attributable to some external force for whose operation nobody is responsible. Obviously the damage must be brought home to the defendant if he is to be compelled to pay for it.

§ 40. **Defendant's breach of duty must be cause of plaintiff's damage.** Clearly plaintiff's damage must be a consequence of defendant's wrongful act or omission, whether the wrong consist of a tort or a breach of contract. How else could we hold the defendant responsible?

This does not mean that his breach of duty must be the *sole* cause of plaintiff's damage; but we may regard it as axiomatic that, somewhere in the chain of causation that ended in plaintiff's damage, must appear as a link the defendant's breach of duty.

§ 41. **Damage must be legally a proximate consequence of defendant's breach of duty.** The general rule is that defendant is liable for proximate, but not for remote consequences; but this rule, unexplained, is misleading, and, understood, is of no assistance. Its natural import is that nearness of the consequence in point of time or sequence of events is the test, but actual proximity is seldom a conclusive factor. Whatever at one time may have been its meaning, the term proximate consequence is nowadays ordinarily used to designate a consequence to which defendant's responsibility extends, whether the action be in tort or contract. Conversely, the corresponding term "remote consequence" means simply a consequence to which his liability does not extend. To state the general rule, then, is merely to restate the problem. The question, thus restated, becomes: what consequences are proximate? We discard this rule as useless. In attempting to answer the question, tort and contract will be separately considered.

Section 2. In Tort.

§ 42. **In general.** The formulation of one general rule, that will serve as a test for determining what consequences of a tort are, in a legal sense, proximate, will not here be attempted; but a few statements and illustrative cases may serve to indicate to some degree the limits of

responsibility for a tortious act. See also the article on Torts, §§ 168-190, in Volume II of this work.

§ 43. **Liability extends to all intended consequences.** No difficulty ever arises in establishing defendant's liability for a consequence which he actually intended to cause. Let his tort appear as a link in the chain of causation that produced a consequence which he intended; his liability for that consequence is a legal conclusion (1).

§ 44. **Liability further extends to all foreseeable consequences.** If the defendant actually foresees that a particular damage will probably befall the plaintiff, as a result of a contemplated tort against the plaintiff, and then commits the tort, it is plain that for all practical purposes he must have intended that consequence. If he did not foresee it we cannot charge him with an intention to produce it; and yet, if we can fairly say that, as an average man, he ought to have foreseen it, we may justly blame him for the consequence. In the realm of torts it is the failure to guard against the foreseeable consequences of the defendant's act that makes him guilty of negligence. In the realm of Damages, so far as it appertains to torts, we start with the assumption that a tort has already been committed, and our problem is simply to ascertain the damages; but here the foreseeable character of an actual consequence of an established tort will, as a rule, fix defendant's liability for that consequence, regardless of the nature of the tort. By one process of reasoning or another that conclusion will usually be reached. A single case will illustrate the rule.

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(1) See Webb's Pollock on Torts, p. 33.

§ 45. **Same: Illustration.** In Guille v. Swan (2), Guille went up in a balloon which descended in Swan's garden. It dragged over growing vegetables, damaging them to the extent of $15. A crowd of over two hundred persons, attracted by the balloon, rushed through the fences and upon the garden, damaging vegetables and flowers to the extent of $75. In an action of trespass, defendant contended that he was not liable for the damage done by the crowd; but the court held that he was. We quote from the opinion of Spencer, C. J.: "I will not say that ascending in a balloon is an unlawful act, for it is not so; but it is certain that an aeronaut has no control over its motion horizontally; he is at the sport of the winds, and is to descend when and how he can; his reaching the earth is a matter of hazard. He did descend on the premises of the plaintiff below, at a short distance from the place where he ascended. Now, if his descent, under such circumstances, would, ordinarily and naturally, draw a crowd of people about him, either from curiosity or for the purpose of rescuing him from a perilous situation—all this he ought to have foreseen, and must be responsible for. Whether the crowd heard him call for help, or not, is immaterial; he had put himself in a situation to invite help, and they rushed forward, impelled, perhaps, by the double motive of rendering aid, and gratifying a curiosity which he had excited."

§ 46. **Liability not restricted to foreseeable consequences.** The statement that defendant is liable for all intended consequences does not involve the assertion that

(2) 19 Johns. 381.

he is not liable for any consequence that is not intended. So the statement that he is liable for all foreseeable consequences does not involve the assertion that he is not liable for any consequence that is not foreseeable. As a matter of fact he is often held liable for consequences that nobody could possibly have foreseen. This is illustrated by a Minnesota case. In Vosburg v. Putney (3), defendant, aged eleven, and plaintiff, aged fourteen, sat opposite each other at school. Defendant reached across the aisle and struck with his toe the right leg of plaintiff. The touch was light. Within a few minutes plaintiff began to feel pain. Later a bone disease developed and plaintiff lost the use of the limb. A previous injury received while coasting had rendered his leg easily susceptible to serious injury, but this fact was unknown to the defendant. Medical testimony agreed that defendant's touch or kick was the exciting cause of plaintiff's disability. Held, the trial court properly refused to restrict the damages to such consequences "as the defendant might reasonably be supposed to have contemplated as likely to result from kicking the plaintiff."

§ 47. **Final limits of responsibility for tort.** Granted that defendant is liable for all intended and foreseeable consequences of his tort, and that his responsibility extends beyond these limits, where does it stop? The answer to this question is one of the most difficult problems in the whole field of the law. The courts are in hopeless disagreement. The limits of this article forbid a detailed

(3) 80 Wis. 523.

treatment, but it is believed that the following delimitation is in accord with the prevailing views.

(a) If the consequence follows the defendant's tortious act in ordinary unbroken sequence, without the intervention of another agency or force, it will usually be considered to be within the scope of defendant's liability. In Bishop v. St. Paul City Ry. Co. (4), defendant negligently upset a cable-car upon which plaintiff was a passenger. Plaintiff was thrown down and rendered unconscious. He soon regained consciousness; did not appear much hurt at first; went about his business the same day and for a considerable time afterward; later became nervous and suffered from headache; seven months later, "without other apparent cause" he suffered a stroke of paralysis, which involved his whole left side. Held, the trial court properly permitted the jury to assess damages for the paralytic stroke. Said the court: "The injury received at the time of the accident was the proximate cause of the paralysis, if it caused the disease in the course of which and as a result of which the paralysis followed."

§ 48. **Same (continued).** (b) Even though an intervening agency or force contribute an essential element to the production of the consequence in question, defendant will, nevertheless, be liable, if we may fairly hold him responsible for such intervention. In Schumaker v. St. Paul & D. R. Co. (5), plaintiff, a car-repairer in defendant's employ, was sent to a point on the line of its road

(4) 48 Minn. 26.
(5) 46 Minn. 39.

to repair a wrecked caboose. Defendant failed to perform its duty of providing him return transportation. As a result he was compelled to walk at night, in extremely cold weather, to a village nine miles distant. In consequence he became sick, contracted rheumatism, and had his health permanently impaired. For these consequences defendant was held liable. We quote a part of the opinion: "There was no intervening independent cause of the injury, for all the acts done by the plaintiff, his effort to seek protection from the inclement and dangerous weather, were legitimate and compelled by defendant's failure to reconvey him to the city. Had he remained at the caboose, and lost his hands or his feet, or perhaps his life, by freezing, no doubt would exist of defendant's liability. It must not be permitted to escape the consequences of its wrong, because the injuries were received in an effort to avoid the threatened danger, or because they differ in form and seriousness from those which might have resulted had the plaintiff made no such effort. An efficient, adequate cause being found for the injuries received by plaintiff, it must be considered the true cause, unless another, not incident to it, but independent of it, is shown to have intervened between it and the result."

§ 49. **Same (continued).** (c) If an intervening agency or force, for which defendant cannot fairly be deemed responsible, contributes an element necessary to the production of the consequence in question, defendant will not be held liable for that consequence. In Hoey v.

Felton (6), in an action for false imprisonment, plaintiff offered evidence tending to prove that, in consequence of his detention by the defendant, he was unable to secure a position which he would otherwise have obtained. The trial court excluded the evidence on the ground that such a consequence was too remote. Held, the exclusion of this evidence was proper. "The wrong would not have been followed by the damage, if some facts had not intervened for which the defendant was not responsible."

Section 3. In Contract.

§ 50. **In general.** In contract, as well as in tort, the general rule is that defendant is liable for the proximate, but not for the remote consequences of his breach of duty; but in contract, as well as in tort, the general rule is misleading and useless. Here, as there, the problem is to determine what consequences are proximate. In solving the problem for contract, we meet with new considerations arising from the fact that contractual duties, unlike duties violated by tort, are created by agreement. We saw that a man is often liable for consequences of his tort, which he could not have foreseen; but in contract, at least in legal contemplation, he is liable for foreseeable consequences only. The idea is that his whole duty is created and limited by agreement, and therefore his responsibility is restricted to such consequences as may fairly be deemed to have been present to his mind as a subject of agreement. Only those consequences of a breach may justly be considered as having been within his

(6) 11 C. B. [N. S.] 142.

contemplation that might, under the circumstances, have been anticipated by him as being reasonably likely to occur. It is this principle that is the foundation of Hadley v. Baxendale, from which is derived the accepted rule of liability for the consequences of a breach of contract.

§ 51. **Rule in Hadley v. Baxendale (7).** Plaintiffs were owners of a gristmill. This mill was stopped by the breaking of a shaft. They sent the pieces of the shaft to defendant, a carrier, with instructions to forward them immediately to the consignee. As the court viewed the facts, defendant was given no notice of the necessity of promptness in forwarding. There was, however, urgent necessity; for plaintiffs were forwarding the broken shaft to be used as a model in the making of a new one, and the mill could not start until the receipt of a new shaft. Defendants did not forward the pieces immediately, but delayed delivery several days. As a result, plaintiffs did not receive the new shaft as they expected and the mill was kept idle. In an action for breach of the contract for prompt carriage, plaintiffs claimed damages for the loss of profits resulting from the idleness of the mill. For this loss the court denied a recovery, laying down the following rule: "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive, in respect of such breach of contract, should be such as may fairly and reasonably be considered either arising naturally, i. e., according to the usual course of things, from such breach of contract itself; or, such as may reasonably be supposed to

(7) 9 Ex. 341.

have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." The court went on to say in effect that, when notice was given of special circumstances which would naturally cause consequences out of the ordinary to flow from a breach, such consequences should be deemed to have been in the contemplation of the parties, but, in the absence of such notice, they could not be supposed to have contemplated consequences other than such as would naturally follow the breach of a contract of that character, in the absence of such special circumstances. Applying this doctrine the court said: "But it is obvious that, in the great multitude of cases of millers sending broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants."

§ 52. **What constitutes notice of special circumstances.** An unsettled question is that of the sufficiency of notice of special circumstances. The notice must at least amount to a reasonable warning of probable consequences in case of a breach, but it is difficult to formulate a more specific rule. Two leading cases, falling on opposite sides of the line, will illustrate the problem.

In Horne v. Midland Ry. (8), plaintiffs were under a contract to supply a large quantity of military shoes to a London firm for the use of the French army. At the time the contract was made the French were at war, the de-

(8) L. R. 7 C. P. 583.

mand for such shoes was therefore extraordinary, and a very high price (4s. per pair) was accordingly agreed to be paid. Delivery was to be made Feb. 3, 1871. Before that date the war had ended, the demand for such shoes had ceased and the market price had fallen to 2s. 9d. per pair. Plaintiffs sent the shoes to defendant's station in time for delivery to the consignee on the evening of Feb. 3d in the ordinary course. The defendant's agent was notified that plaintiffs were under a contract to deliver the shoes by the 3d, and that, in case of non-delivery, the shipment would be thrown on their hands, but no notice was given that this contract provided for a sale at what was then an unusually high price. Owing to defendant's negligence the shoes did not reach the consignee until the 4th, when, of course, they were rejected. Plaintiffs were obliged to sell them at a loss of 1s. 3d. per pair, obtaining for them the market price, 2s. 9d. Following Hadley v. Baxendale, the court said: "The damages are to be limited to those that are the natural and ordinary consequences which may be supposed to have been in the contemplation of the parties at the time of the making of the contract." Applying this rule, recovery for plaintiffs' loss was denied. "It would be an extraordinary result to arrive at, to hold that a mere notice to the carriers that the shoes would be thrown upon the hands of the consignors, if they did not reach the consignees by the 3d of February, should fix them with so large a claim, by reason of facts which were existing in the minds of the consignors, but were not communicated to the carriers at the time."

§ 53. **Same: Further illustration.** In Booth v. Spuyten Duyvil Rolling Mill Co. (9), plaintiff contracted with the New York Central Railroad Company to sell and deliver to it, by a certain date, 400 tons of steel rails to be composed of an iron foundation and steel caps, for the invention of which plaintiff had obtained a patent. Thereafter he entered into a contract with the defendant, whereby the latter undertook to make and deliver by a specified date all the caps which would be required for the execution of his contract with the railroad. At the time of making their contract, plaintiff informed the defendant of the existence of his contract with the railroad, although defendant was not informed of the price plaintiff was to receive for the rails. The caps alone had no market value. Had they been furnished at the agreed time, plaintiff could have performed his contract with the railroad. They were not furnished at all, and in consequence plaintiff lost the profits of that contract. For this loss he brought an action. On the trial no claim was made that the price which plaintiff was to get for the rails was unreasonable. The lower court allowed about 15 per cent for profits, including the use of the patent. Held, this was not unreasonable. The court of appeals approved Hadley v. Baxendale and Horne v. Midland Ry., distinguishing the latter on the grounds that there the article had a well-known market value and the price specified was unusual. The court said in part:

"This case presents all the elements which have been recognized for the application of the rule of liability.

(9) 60 N. Y. 487.

The plaintiff contracted with the defendant expressly to enable him to perform his contract with the railroad company, which the defendant knew. It is not claimed that the price at which the completed rails were agreed to be sold was extravagant or above their value; and, as there was no market price for the article, the fact that the defendant was not informed of the precise price in the subcontract does not affect its liability. Nor does the fact that the defendant's contract does not embrace the entire article resold, relieve it from the consequences of nonperformance. It was a material portion of the rail, without which it could not be made; and, solely by reason of the failure of the defendant, the plaintiff failed to perform his contract, and thereby lost the amount for which he has recovered."

Section 4. Avoidable Consequences.

§ 54. **In general.** In discussing the extent of defendant's liability for the consequences of his tort or breach of contract, we have assumed that the plaintiff himself was in no way to blame for any of the harm of which he complains. If, however, the circumstances are such that we may fairly attribute any item of damage, suffered by the plaintiff, to his own neglect, it would seem to be axiomatic that he could not recover damages under that head. It often happens that a plaintiff, whose right has been violated and who therefore has a good cause of action entitling him to at least nominal damages, is denied substantial damages, in whole or in part, on the ground that he himself is wholly or partly responsible for the actual damage he has sustained. A plaintiff may not recover

compensation for damage which the exercise of reasonable prudence on his part would have prevented. The rule is of general application in tort and contract, as the following cases will illustrate.

§ 55. **Same: Illustrations.** In Loker v. Damon (10), defendant broke down a part of plaintiff's fence. Plaintiff neglected to repair it for many months. In the meantime cattle got in and destroyed his crop. Had he acted with reasonable promptness in making the repairs his crop would have been saved. Held, the cost of repairing the fence, and not the value of the crop, is the measure of damages. The loss of the crop was an avoidable consequence. In Ind. B. & W. Ry. v. Birney (11), defendant failed to stop its train to take on plaintiff, as it was defendant's duty to do. Although the distance was long and the weather extremely cold, he walked to the next station. His health was seriously impaired by the exposure and over-exertion. Evidence was offered to show that he could have taken another train, or procured a horse and carriage. Held, it was error for the court below to exclude such evidence. It would have proved that the journey on foot, with its consequences, was attributable to the plaintiff's own imprudence. In Sutherland v. Wyer (12), defendants employed plaintiff, an actor, to act at their theatre during an entire season. Without excuse they discharged him after a short time. He could have obtained employment at acting elsewhere, but did not make a reasonable effort to do so. Held, his recovery

(10) 17 Pick. 284.
(11) 71 Ill. 391.
(12) 67 Me. 64.

will be restricted to the stipulated wages, less whatever sum he actually earned, or might have earned elsewhere by the use of reasonable diligence; "in contract as well as in tort, it is generally incumbent upon an injured party to do whatever he reasonably can, and to improve all reasonable and proper opportunities to lessen the injury."

§ 56. **Avoidable consequences and contributory negligence.** The doctrine of avoidable consequences needs to be distinguished from that of contributory negligence, which involves a similar principle. In some torts, as we have seen, damage is essential to injury; a cause of action is not made out until actual damage is proved. One of these actions is that for negligence. An action for negligence is not complete until damage befalls the plaintiff as a legal consequence of defendant's negligent act; but, if the resulting damage is, in the eye of the law, a consequence of the union of plaintiff's own negligence with that of the defendant, we have a case of contributory negligence and a right of action usually does not accrue. See Torts, §§ 191-200, in Volume II of this work. The doctrine of avoidable consequences, on the other hand, assumes an existing cause of action. To illustrate: Plaintiff is thrown to the ground and his arm broken by the starting of defendant's street-car, while he is in the act of boarding it. By the law of torts his right of action depends upon the concurrence of two conditions: (1) negligence on the part of defendant in starting the car; (2) due care upon the part of plaintiff in boarding it. Assuming that both of these conditions were present, his right of action is completed by the breaking of his arm.

The plaintiff now fails to see a surgeon. For want of proper surgical attention the broken bone heals improperly, and the usefulness of the arm is permanently impaired. His recovery is restricted to compensation for such damage as would have followed had he acted reasonably and obtained surgical aid; he cannot recover for the element of aggravation—that was an avoidable consequence.

§ 57. **Limitations of doctrine.** The doctrine is subject to necessary limitations. The plaintiff need not exercise omniscience. His conduct is to be measured by the standard of ordinary prudence. Thus, if he exercises reasonable care in selecting a surgeon to care for the wound that defendant has inflicted, he will not be deemed an insurer against the surgeon's error of judgment or want of the highest skill (13). Neither will he be required to incur a risk of additional loss, in an effort to avoid the consequences of defendant's wrong (14). And, of course, he need do nothing in itself unlawful; the defendant cannot be heard to say that a part of plaintiff's damage results from his unwillingness to break a contract with a third person (15), to trespass upon his neighbor's property (16), or to engage in fraudulent practices (17).

§ 58. **Recovery of expenses incurred in avoiding consequences.** It would be unreasonable to hold that plaintiff must be put to expense, in order to save the defendant

(13) Loeser v. Humphrey, 41 Ohio St. 378.
(14) McCleneghan v. Omaha etc. R. Co., 25 Neb. 523.
(15) Leonard v. N. Y. etc. Tel. Co., 41 N. Y. 544, 566.
(16) Fromm v. Ide, 68 Hun, 310.
(17) Baker v. Lever, 67 N. Y. 310.

from paying damages for avoidable consequences. On the other hand, it would needlessly pile up damages in many cases to permit plaintiff to recover for all damage that could not be avoided without expense to somebody. Accordingly the law adopts the rule of indemnity: Plaintiff must do whatever is reasonable; defendant must reimburse plaintiff for all expenses incurred in so doing. And this rule is followed, although its application sometimes has the effect of actually increasing the damages which defendant must pay. Thus, where plaintiff's horse was seriously injured by defendant's negligence, and plaintiff, in the exercise of reasonable care, expended $35 procuring medical treatment, notwithstanding which the horse died, he was allowed to recover this item as well as the value of the horse (18). On the other hand, since plaintiff is not required to make more than a reasonable effort to avoid damage, he will not be indemnified for expenses incurred in an unreasonable effort. Thus, it was held that a passenger could not recover for the expense of hiring a special train, which he took for the purpose of reaching his destination to avoid delay occasioned by defendant's negligence, it appearing that there was no urgent necessity for his presence at his destination (19).

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(18) Ellis v. Hilton, 78 Mich. 238.

(19) Le Blanche v. London & N. W. R. Co., 1 C. P. D. 286.

CHAPTER V.

MEASURE OF DAMAGES.

Section 1. Forms of Damage Compensated.

§ 59. **In general.** The law does not undertake to compensate, as legal damage, every sort of harm known to human experience. Some forms of harm are not universal; they depend upon individual peculiarities and temperament. Others are vague and intangible, difficult to establish by proof, difficult to trace to a responsible source. Viewing the problem as one to be solved for society as a whole, subject to the necessary limitations of court procedure, the law has recognized only certain forms of harm as calling for compensation. They constitute the items of damage, the heads of recovery, upon the basis of which compensatory damages are computed.

§ 60. **Pecuniary damage.** Some forms of damage are universally estimated in terms of money. This is necessarily so when money itself has been lost. And money is the natural standard of measurement when goods are lost or destroyed, when land is taken or injured, when valuable time is lost, and when an advantageous contract is broken. Such forms of damage are known as pecuniary. They are always compensated by the allowance of an equivalent, estimated by monetary standards.

§ 61. **Non-pecuniary damage.** All forms of damage are pecuniary, in the sense that they must be compensated in money if at all; but some forms are non-pecuniary, in the sense that they are not commonly measured by pecuniary standards. Men do not ordinarily measure the intensity of physical pain or mental suffering in terms of dollars and cents. When compensation for such forms of harm is allowed, the damages are said to be at large, or in the discretion of the jury. Some forms of non-pecuniary harm are altogether rejected, as being too vague or refined for ascertainment under our system of procedure. Some of the heads of non-pecuniary damage will now be considered separately.

§ 62. **Physical pain.** Compensation is universally allowed for physical pain, resulting as a legal consequence from defendant's tort or breach of contract (1).

§ 63. **Physical discomfort and inconvenience.** Physical discomfort is also a well-recognized head of damage. Recovery is common in actions for nuisances, for discomfort caused by loud noises or disagreeable odors (2). For inconvenience, such as fatigue, recovery is also allowed, whether the action be tort or contract (3).

§ 64. **Mere annoyance.** For mere annoyance, such as disappointment resulting from the delay of a train, no damages may be assessed (4). Compensation for such forms of harm is impracticable under the jury system.

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(1) Hobbs v. London & Southwestern Ry., L. R. 10 Q. B. 111.
(2) B. & P. R. Co. v. First Baptist Church, 108 U. S. 317.
(3) Hobbs v. London & Southwestern Ry., L. R. 10 Q. B. 111.
(4) Hamlin v. Great Northern Ry. Co., 1 H. & N. 408.

§ 65. **Mental suffering.** The law is not well settled as to the conditions under which mental suffering will be compensated. Ordinarily this head of damage is not recognized in actions on contract, but actions for breach of promise of marriage constitute a well-recognized exception (5). In actions of tort the recovery of damages for mental suffering depends largely upon the nature of the wrong by which it was caused. For mental suffering in the form of insult or injured feelings, compensation may be had in the case of a malicious tort, whether the right primarily involved relates to person or property (6). When the tort is not wilful, recovery for insult would of course be out of place, and, in such case, recovery for mental suffering will usually be allowed only where a physical injury is inflicted upon the plaintiff (7). For mental anguish or nervous shock, accompanying or flowing from actual physical injury, compensation will, as a rule be granted (8).

SECTION 2. ESTIMATION OF NON-PECUNIARY DAMAGES.

§ 66. **Discretion of jury.** Where the rights violated are purely personal, as in the case of assault, libel, or false imprisonment, the damages are within the discretion of the jury, subject only to the limitation of what is reasonable. Where, however, pecuniary losses can be proved, with sufficient certainty, to have resulted as a legal consequence of such an injury, allowance therefor

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(5) Vanderpool v. Richardson, 52 Mich. 336.
(6) Meagher v. Driscoll, 99 Mass. 281.
(7) Wyman v. Leavitt, 71 Me. 227.
(8) Chicago v. McLean, 133 Ill. 148.

should be made. Examples of such losses are loss of time, loss of income, and expenses of nursing and medical attendance (9-10).

§ 67. **Aggravation and mitigation.** In the chapter upon exemplary damages (§§ 16-21, above), we have seen that circumstances of aggravation may be given in evidence in actions for wilful torts, as a basis for the assessment of punitive damages. In like manner, circumstances of mitigation may be shown for the purpose of reducing the damages. Sometimes they are relied upon as tending to show that the actual damage is of limited extent, as where evidence of plaintiff's bad reputation is given in an action for libel or slander (11). More often they are introduced to counteract evidence in support of exemplary damages, as where evidence of provocation is shown in an action of assault and battery. There is a question, whether bad motive on the part of plaintiff should ever have the effect of reducing his damages for actual damage proved; but it is settled that it should be considered when the question is as to exemplary damages. It would be unjust to punish the defendant for acting maliciously, if plaintiff's own malicious conduct were disregarded (12).

SECTION 3. COMPUTATION OF PECUNIARY DAMAGES.

§ 68. **In general.** When the damage is pecuniary, the jury must act within limits imposed by the law's ideal of exact compensation. Such compensation ordinarily means the payment of the monetary equivalent of that

(9-10) Phillips v. London & S. W. R. Co., L. R. 4 Q. B. Div. 406.
(11) Sickra v. Small, 87 Me. 493.
(12) Cushman v. Waddell, 1 Baldw. 59.

which has been lost. The methods of ascertaining this equivalent will now be considered.

§ 69. **Value as a measure of damages.** The normal measure of damages for a contract broken, or for property lost, destroyed, or damaged is that of value. In the case of a contract this is measured by the advantage lost; according to the purpose of the contract this loss may appear in various ways, as a loss of wages, a loss of profits, or perhaps a loss of property, to preserve or protect which the contract was made. If plaintiff has lost wages, his measure of damages is the wages he has earned or might have earned in similar employment elsewhere (13). Usually the value of a contract is measured by profits lost. Granted that the requirements of Hadley v. Baxendale (§ 51, above) are satisfied, the only question is as to certainty of proof. If the contemplated profits were purely speculative, recovery would of course be denied. Where profits can be shown with certainty to have been lost, recovery may be had although exact measurement is impossible—however roughly they must be estimated, they are taken as representing the value of the contract (14). In some cases the profits lost are capable of being ascertained with exactness. The frequent occurrence of certain classes of cases has resulted in the crystalization of a few rules of exactness that are applicable to such cases. Thus the difference between the contract price and the market value, at the time and place of delivery, is the usual measure of damages for

(13) Sutherland v. Wyer, 67 Me. 64.
(14) Bagley v. Smith, 10 N. Y. 489.

the breach of a contract of sale (15). And the measure of damages for delay in carrying goods is the difference between the market value, at the time and place of delivery as required by the contract, and the same value at the time of actual delivery (16). The difference in each case represents the value of the contract.

§ 70. **Market price as a test of value.** When the question is as to the value of property, whether as the subject of a contract of sale or carriage, or as the object of an injury, the market price is the usual standard. This is because the market price is ordinarily an accurate gauge. So much reliance is placed upon this standard that, in the absence of a market at the place of injury, resort will be had to the nearest available market in order to arrive at the actual value (17). If, however, the market price is demonstrably an unfair test, it will be rejected. This is clearly the case where the market price is a result of fraudulent manipulation; obviously it does not measure the true value; the law makes an allowance for the effect of the disturbing factor (18). Sometimes there is a market price, but, owing to peculiar circumstances, that price does not represent the real value to the owner, nor fairly measure his loss. Thus the fact that there is a market for second-hand clothes did not prevent a plaintiff from recovering the value of a portmanteau of clothes, upon the basis of their usefulness and special value to

(15) Johnson v. Allen, 78 Ala. 387.
(16) Ward v. N. Y. Cent. R. Co., 47 N. Y. 29.
(17) Grand Tower Co. v. Phillips, 23 Wall. 471.
(18) Kountz v. Kirkpatrick, 72 Pa. St. 376.

him (19). Sometimes the goods are not saleable at all, and yet their value to the owner may be considerable. In such case, a fixed standard is impossible; the jury must be given a discretion approaching that which it exercises in a personal injury case, or the plaintiff will go without a remedy. The law does not put exactness before justice, and accordingly allows the jury to fix the damages upon the broad basis of what is reasonable under all the circumstances. Thus, where the question arose as to an oil portrait of the plaintiff's father, which was of value only to plaintiff, it was held that evidence as to the original cost, the practicability and expense of replacing it, and the fact that plaintiff had no other, was proper for the consideration of the jury (20).

§ 71. **Higher intermediate value.** What has heretofore been said in regard to value, as a test for determining the extent of plaintiff's loss, has been upon the assumption that the property involved was of normally stable value. Often, however, the value of property is subject to wide and frequent fluctuations. In such cases a serious problem is presented. The question most frequently arises where property is converted or appropriated by the defendant to his own use. The general rule for conversion makes the value of the property at the time of the conversion the test (21); but, where the property fluctuates in value, this may bear with hardship upon the plaintiff, who may have held the property in the expectation of an increase in value. To insure full compensa-

(19) Fairfax v. N. Y. Cent. & H. R. R. R., 73 N. Y. 167.
(20) Green v. B. & L. R., 128 Mass. 221.
(21) Beede v. Lamprey, 64 N. H. 510.

tion to the plaintiff, some courts allow the highest intermediate value, i. e., the highest market value of the article between the date of conversion and the date of trial (22); but this often works a hardship upon the defendant, for it is by no means certain that the plaintiff would have sold at the highest market price. Many other courts take a middle course, and hold that compensation in such cases is properly made by allowing the highest market value of the property, that is reached within such a time, after plaintiff has received notice of the conversion, as will afford him a reasonable opportunity for replacing the property converted (23). Here will be seen an application of the doctrine of avoidable consequences. This middle ground represents the prevailing view, when the property is in the form of stocks (24). Where the property is of fluctuating character, but stocks are not involved, the alignment of the courts is very different, the weight of authority favoring the application of the general rule for ordinary cases of conversion (25).

§ 72. **Deduction for benefits conferred: By defendant.** Several questions arise with regard to the deduction to be made for benefits conferred upon the plaintiff. Where, after damage has been inflicted, the plaintiff has accepted reparation in whole or in part from the defendant, this must of course be considered as reducing the damages to the extent of the value of that which has been re-

(22) Burks v. Hubbard, 69 Ala. 379.
(23) Baker v. Drake, 53 N. Y. 211.
(24) Galigher v. Jones, 129 U. S. 193.
(25) See cases cited, 13 Cyc. 171.

ceived (26). A common case is the return of property which has been tortiously taken. But a defendant cannot compel the plaintiff to accept reparation; the unaccepted tender of property by way of reparation is of no effect (27). Sometimes, the very act which inflicts the damage also confers a benefit. In such a case the courts regard the net result as measuring the actual damage inflicted by the wrongful act. Thus, where the damage consisted in placing a large quantity of earth upon plaintiff's land, the court declined to allow him what it would cost to remove the earth, but said that the actual damage sustained could be determined only by considering and allowing for such benefits as might have arisen from placing the earth upon the land (28). So much for benefits conferred by the defendant.

§ 73. **Same: By third party.** Frequently the benefit is conferred by a third person. When the plaintiff accepts a benefit from a third person, this benefit will not inure to the defendant by way of reducing his damages. In reliance upon this rule, decisions have been rendered which seem at first blush to involve hardship upon the defendant. Thus, it has been held that the recovery of a plaintiff, entitled to compensation for loss of time, will be unaffected by an employer's generosity in paying plaintiff his full salary during the period of idleness enforced by defendant's wrong (29). It has also been held that a plaintiff, entitled to compensation for necessary

(26) Torry v. Black, 58 N. Y. 185.
(27) Carpenter v. Dresser, 72 Me. 377.
(28) Mayo v. Springfield, 138 Mass. 70.
(29) Elmer v. Fessenden, 154 Mass. 427.

nursing and medical attendance as a result of a personal injury, could recover their full value, notwithstanding the services of nursing were donated by a friend (30). In these cases, the benefit is looked upon as a gift to the plaintiff, the bestowal of which is immaterial as regards the defendant. Sometimes, the benefit is conferred by a third person acting under a contract with the plaintiff. In such case, as between plaintiff and defendant, the performance of the third person's undertaking is regarded simply as a contractual right of the plaintiff. Thus, a plaintiff recovers the full value of goods wrongfully taken by the defendant, although they have been subsequently destroyed by fire and the plaintiff has recovered their full value from an insurance company under a policy executed by it in his favor (31).

§ 74. **Interest.** Since a plaintiff is entitled to compensation, as soon as his cause of action accrues, it might seem that, in all cases in which compensation is awarded, the damages should include interest down to the time of recovery, as compensation for the use of money which ought to have been paid as damages immediately upon the infliction of the damage. When the damage is pecuniary, this principle appears to be recognized. In such cases interest is generally allowed, either as matter of right or as coming within the discretion of the jury. It is recoverable as of right upon judgments (32), upon all liquidated demands (33), and upon contracts which pro-

(30) Brosnan v. Sweetser, 127 Ind. 1.
(31) Perrott v. Shearer, 17 Mich. 48.
(32) Mahurin v. Bickford, 6 N. H. 567.
(33) Dodge v. Perkins, 9 Pick. 368.

vide for it expressly or impliedly. It is sometimes allowed under rules of damages applicable to particular classes of actions, as in those for breach of a contract of sale (34) or of carriage (35), and in actions for the conversion of property (36). In other cases of pecuniary damage, interest is not allowable as a matter of right, but the jury is permitted to consider interest as allowable within its discretion; such a case is an action for the negligent destruction of property (37). In one case of undoubted pecuniary damage, interest is never allowed in the absence of a valid agreement therefor; as a matter of policy, the law guards against the dangers of compound interest, and will not allow interest as compensation for delay in the payment of interest due (38). When the damage is in its nature non-pecuniary, as in an action for personal injury, interest is never allowed (39); but the wide discretion of the jury, together with the practice of allowing prospective damages, doubtless amounts to a practical equivalent in most cases.

§ 75. **Expenses of litigation.** The plaintiff who is compelled to resort to litigation, in order to obtain a remedy for the wrong done by the defendant, necessarily incurs expense. This expense is very substantial pecuniary harm, and it is occasioned by the defendant. Is it an item of pecuniary damage for which an allowance is made?

(34) Dana v. Fiedler, 12 N. Y. 40.
(35) Houston, etc. R. Co. v. Jackson, 62 Tex. 209.
(36) Andrews v. Durant, 18 N. Y. 496.
(37) Richards v. Gas Co., 130 Pa. St. 37.
(38) Henry v. Flagg, 13 Met. 64.
(39) L. & N. R. Co. v. Wallace, 91 Tenn. 35.

It is a familiar rule that the unsuccessful litigant pays the costs of the action; but such payment is not regarded as the payment of damages for a wrong done. Costs are due from the innocent plaintiff, who has failed in an attempt to obtain a remedy by exercising his right to litigate, as well as from a defendant who has clearly violated the plaintiff's right. They are a conditional incident to litigation, rather than an element of damages. In America the costs do not include counsel fees. In the absence of express contract or statute, they are not recoverable either as costs or as damages in an ordinary case (40). They are allowed as an item of compensatory damages, when defendant's wrong has proximately caused plaintiff to engage in litigation with a third person (41). In some jurisdictions they may also be given in evidence as bearing upon the question of exemplary damages (42). But, as a general rule, neither costs nor counsel fees are deemed a proper basis for the assessment of damages. The reason may perhaps be found in the difficulty of determining whether or not litigation is a proximate consequence of defendant's wrong; perhaps also in public policy, which might well oppose the placing of too heavy penalties upon the unsuccessful litigant.

Section 4. Limitations Imposed by Nature of Plaintiff's Interest.

§ 76. In general. Heretofore, we have assumed that the defendant's wrongful act or omission has been a viola-

(40) Day v. Woodworth, 13 How. 363.
(41) Philpot v. Taylor, 75 Ill. 309.
(42) Welch v. Durand, 36 Conn. 182.

tion of the right of one person only; but it often happens that his conduct has constituted a legal injury to two or more. In such case it is plain that each party is entitled to full compensation for all the damage sustained by him. If defendant's negligence causes a train wreck and a score of passengers are injured, it is evident that the right of one passenger to recover full damages will be unaffected by defendant's duty to compensate the others. If in the same wreck each passenger's baggage is destroyed, his right to full compensation for his property loss is none the less clear. If, however, a defendant's wrong-doing has resulted in damaging property in which more than one person has an interest, the operation of the principle, though none the less certain, is not so obvious. Of course, if the general ownership is simply divided among several persons, one having say a half interest, another a fourth, and so on, no difficulty arises; this introduces but a simple matter of arithmetical computation. But interests in property are not confined to sharing the general ownership. The hirer, the lessee, the mortgagee, the mere possessor, all have an interest. How shall the owner of such a limited interest be compensated? In answering this question realty and personalty must be separately considered.

§ 77. **Interests in realty.** Various persons may have different interests in the same land. When such a tract is damaged, each person is entitled to compensation for his actual loss, as measured by the extent of his own interest. A hypothetical case will illustrate this: M, a widow, has a life interest in land which was the property

of her late husband. Upon her death, his son and heir, X, will come into full ownership. The two unite in executing a lease to K for a term of years. Defendant wrongfully floods the land; K's growing crop is destroyed, much of the soil is carried away, and so much debris is deposited that much of the tract is rendered unfit for cultivation. In such a case M could recover for the loss in value of her life estate, which would be estimated upon the basis of its rental value, her expectation of life, and the probable expenses incident to her interest (43); X could recover for the depreciation in the value of his reversionary interest (44); and K could recover an amount measured by the value of the crop destroyed, plus the loss in the value of his unexpired term (45).

§ 78. **Interests in personalty.** The law with regard to interests in personalty is less simple. Owing perhaps to considerations of policy growing out of the movable character of personal property, possession thereof gives an owner's rights against a stranger. Against one who has no title or interest whatever, possession alone gives a right to full damages for personalty wrongfully taken; the damages paid, the possessor becomes a trustee of the proceeds for the benefit of the owner (46). Thus, where a chimney-sweep found a jewel and took it to a goldsmith, whose servant wrongfully removed the stones, the sweep recovered the full value of the stones from the smith (47).

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(43) Greer v. New York, 1 Abb. Pr. (N. S.) 206.
(44) Dorsey v. Moore, 100 N. C. 41.
(45) Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.
(46) Lyle v. Barker, 5 Binney, 457.
(47) Armory v. Delamirie, 1 Stra. 505.

Had the owner appeared later, he could have looked to the sweep for compensation. In case the question arises between the general owner and one having a special interest, a different rule prevails. It would be absurd to allow either to recover the full value of the chattel from the other, and then treat him as a trustee of the proceeds to the extent of the other's interest. To simplify matters, the law measures the recovery of either by the extent of his interest. Thus, where plaintiff bought a drove of sheep on credit and left them with the vendor, who wrongfully sold them, it was held that plaintiff's damages must be measured by his actual loss, which would be the difference between the value of the sheep at the time of the wrongful sale and the price he had agreed to pay for them (48). In such a case, his damages would be nominal, unless the value at the time of sale were substantially above the purchase price.

(48) Chinery v. Viall, 5 M. & W. 288.

CHAPTER VI.

DAMAGES IN CERTAIN IMPORTANT ACTIONS.

§ 79. **Special rules applicable in certain actions.** In most actions the measure of damages is simply the resultant of the operation of those rules of a general character which are applicable to the facts of the particular case. In considering these general rules in the preceding chapters, we have necessarily dealt with their operation in various actions of both contract and tort. Some actions, however, are of such frequent occurrence, or present such peculiar features, that the courts have come to recognize special rules for determining the measure of damages when these actions are being maintained. Some of the more important of these rules will now be considered. Naturally some of the most important of them have to do with the sales of goods.

Section 1. Actions Relating to Sales of Goods.

§ 80. **Distinction between sales and contracts to sell.** A sale of personalty occurs when, by agreement of the parties, title passes from the vendor to the vendee for a price in money. The completed sale leaves the vendee with all the vendor's former right of property in the thing sold. With the passage of title, the vendor's right to the agreed price becomes fixed; a breach by the vendee

will consist of a failure to pay. When the title has passed, the vendor can do nothing farther by way of carrying out the sale; but the article sold may not be all that he has warranted it to be, in which case he may be sued by the vendee for breach of warranty. When the title has not passed, the vendor still has the goods and is therefore not entitled to their price; but he may be under a binding contract to sell and deliver the goods, at some time in the future, to a vendee who has agreed to accept and pay for them. A breach of such a contract by the vendor would consist in his failure to deliver in accordance with the terms of the contract; the vendee's breach, on the other hand, will consist in a failure to accept and pay for them. Each of these breaches presents its own problem.

§ 81. **Completed sale: Breach by vendee.** The vendee's failure to pay the agreed price is an obvious instance of non-payment of money and the measure of damages is simple; the vendor will recover the amount due, together with interest during the delay. Frequently the purchaser leaves the goods in the hands of the seller after the title has passed. This, however, does not alter the measure of damages. But, in such a case, the vendor is allowed to dispose of the goods at the best price obtainable, and apply the proceeds upon the amount due him (1).

§ 82. **Same: Breach of vendor's warranty.** An article fails to correspond with the seller's warranty. How much should the purchaser recover? An actual case sup-

(1) Sawyer v. Dean, 114 N. Y. 469.

plies the answer (2). Plaintiff paid $90 for a horse, which was warranted to be sound but which actually had a disease of the eyes. The trial court charged that the plaintiff was entitled to the difference between the price paid and the value of the horse with the defect. This was held to be error. Said the higher court: "A warranty on the sale of a chattel is, in legal effect, a promise that the subject of the sale corresponds with the warranty in title, soundness, or other quality to which it relates. It naturally follows that, if the subject prove defective within the meaning of the warranty, the stipulation can be satisfied in no other way than by making it good. That cannot be done except by paying to the vendee such sum as, together with the cash value of the defective article, shall amount to what it would have been worth if the defect had not existed." But this difference does not in all cases mark the limit of recovery. Here, as elsewhere, the rule of Hadley v. Baxendale (§ 51) applies, and the vendee may recover for such consequential damages as the parties may fairly be deemed to have contemplated. Thus, where a cow was sold with a warranty that she was free from a certain infectious disease, and the seller knew that the buyer would place her with other cattle, and it appeared that she was at the time of the sale affected with the disease, it was held that the seller was liable upon his warranty for the loss of other cattle as a consequence of contracting the disease from the warranted cow (3).

§ 83. **Contract to sell: Breach by vendee.** When the

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(2) Cary v. Gruman, 4 Hill, 625.
(3) Smith v. Green, 1 C. P. D. 92.

title has not passed, and the buyer's breach consists in a total failure to carry out the bargain, the seller is left with full title to the goods but has clearly lost whatever value the bargain had (4). Accordingly he recovers nominal damages, unless the actual value of the goods at the time and place of delivery is less than the contract price, in which case he recovers the difference as a fair measure of the advantage which he has lost. Thus, where a contract was made in New York for the delivery of glass in Antwerp, and the buyer refused to accept delivery, it was held error to instruct the jury that the measure of damages was the difference between the contract price and the market price in the city of New York, the higher court holding that the market price at Antwerp should govern (5).

§ 84. **Same: Breach by vendor.** For the vendor's failure to deliver goods, in accordance with his contract, the vendee's measure of damages is the converse of the vendor's in the case where the vendee fails to accept; in other words, upon the vendor's non-delivery at the stipulated time, the vendee's damages are nominal, unless he can show that the value of the goods, at the time and place of delivery, exceeds the contract price, in which case he may recover the difference as representing the value of the bargain that he has lost. Thus, where defendant had agreed to deliver to plaintiff a quantity of iron in equal instalments in September, October, and November, but failed to deliver any part of it, the court held that the

(4) For vendor's option to treat sale as complete upon tender, in some cases, see Sales, §§ 108-9, in Volume III.

(5) Cohen v. Platt, 69 N. Y. 348.

measure of damages was the sum of the differences between the contract and market prices of one-third of the total amount, upon the last day of each of the months specified (6). But here, too, it should be remembered that the rule of Hadley v. Baxendale may be relied upon to give the purchaser special damages for the consequences of non-delivery, when a special use was contemplated by both parties (7).

Section 2. Contracts Relating to Realty.

§ 85. **Contracts of sale: Breach by vendee.** A contract for the sale of land looks to a future conveyance of title by the vendor, and to an acceptance of that conveyance by the vendee. If the vendee receives the title, his obligation to pay the agreed price is obvious and presents no special problem. If he refuses to accept the conveyance, it is clear that he has broken his contract and that he must pay the vendor an adequate compensation for the loss of his bargain, but it is equally clear that he ought not to pay the contract price for the land; to compel him to do that would leave the vendor with his land and its purchase price too. Accordingly, the same rule is applied as in the case of personalty; the vendor recovers nominal damages only, unless he can show that the value of the land at the time for executing the conveyance was less than the agreed price, in which case he is entitled to the difference (8).

§ 86. **Same: Breach by vendor.** Upon the principles

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(6) Brown v. Muller, L. R. 7 Ex. 319.
(7) Booth v. Spuyten Duyvil Rolling Mill Co., 60 N. Y. 487.
(8) Old Colony R. R. Corporation v. Evans, 6 Gray, 25.

generally applicable to actions on contracts, it is plain that, where the vendor refuses to execute a conveyance, the vendee should recover the value of his bargain. We saw that where a vendor breaks his contract to deliver goods, the damages ordinarily recoverable by the vendee are nominal, unless he can show that the value of the goods at the time for delivery exceeded the contract price, in which case he may recover the difference. Some American courts apply a similar rule when the action is against the vendor for nonperformance of a contract to convey land (9). On principle, it seems hard to distinguish between sales of realty and personalty in this respect; but the settled English rule is to limit the vendee's recovery to nominal damages and any part of the purchase price which he may have paid, in any case in which the vendor, whose conduct has been free from fraud, is unable to make a good title (10). And this rule has been frequently acted upon in this country. Thus where defendant, the widowed mother of six children, agreed to sell for $800 land belonging to the children, which was worth $2000 and which she supposed she could obtain authority to convey, it was held error to award damages in the sum of $1200 for her refusal to convey, upon her failure to obtain the requisite court authority (11). The court said that the recovery should have been confined to the purchase-money paid ($25) and interest thereon. The general rule, and the exceptions recognized in this country where the rule itself prevails,

(9) Hopkins v. Lee, 6 Wheat. 109.
(10) Flureau v. Thornhill, 2 W. Bl. 1078.
(11) Margraf v. Muir, 57 N. Y. 155.

are well expressed in the following extract from the opinion:

"The referee allowed the plaintiff as damages the difference between the contract-price and the value of the land, thus placing him in the position he would have been if the contract had been performed. In this I think he erred. The general rule in this state, in the case of executory contracts for the sale of land, is that, in case of breach by the vendor, the vendee can recover only nominal damages, unless he has paid part of the purchase money, in which case he can also recover such purchase money and interest. But to this rule there are some exceptions based upon the wrongful conduct of the vendor, as if he is guilty of fraud, or can convey but will not, either from perverseness or to secure a better bargain, or if he has covenanted to convey when he knew he had no authority to convey; or where it is in his power to remedy a defect in his title and he refuses or neglects to do so, or when he refuses to incur such reasonable expenses as would enable him to fulfill his contract. In all such cases, the vendor is liable to the vendee for the loss of the bargain, under rules analogous to those applied in the sale of personal property. Here no fraud was perpetrated on the vendee."

§ 87. **Breach of covenant of seisin.** A contract to convey is performed by executing a conveyance. The deed of conveyance usually contains covenants. These covenants are in the nature of contractual undertakings, but those usually contained in deeds differ radically from ordinary contracts with respect to the measure of damages

for their breach. For reasons partly historical and partly founded upon considerations of policy, the amount of the purchase money paid, and not the value of the bargain, is the measure of damages generally adopted in actions brought upon such covenants. The rule applicable to the familiar covenant of seisin, and to its substantial equivalent, the covenant of right to convey, is an example. If, at the time of conveyance, the grantor has a good title to all he attempts to convey, neither of these covenants can ever be broken; if, on the other hand, there is at that time a want of title to the whole or to a part of the land which his deed purports to convey, there is a breach at the moment of conveyance. When the title fails as to the whole, the purchaser recovers the consideration paid with interest; when there is a failure as to a part only, he recovers a ratable proportion of the purchase money and interest thereon (12).

§ 88. **Breach of covenants of warranty and quiet enjoyment.** The covenants of warranty and quiet enjoyment are similar in effect and subject to the same rule of damages. Neither is broken until there is an eviction by the grantor (or, in case of a lease, by the lessor), or by a third person under lawful claim of title (13). When such a breach occurs, the covenantee recovers, not the value of the property at the time of the eviction, but the amount of the purchase money paid, or, in case of partial eviction, a ratable proportion thereof (14). Interest is

(12) Staats v. Ten Eyck's Ex'rs, 3 Caines, 111.

(13) Tiffany, Real Property, sect. 398.

(14) Rawle, Covenants for Title, sect. 164. Contra: Cecconi v. Rodden, 147 Mass. 64.

also recoverable. And, where eviction is the result of an action at law, of which the covenantee has given the covenantor notice, the covenantee recovers his expenses in such action. From this statement of the rule, it will be correctly inferred that no allowance is made to the grantee for appreciation in value or improvements made by him, after the conveyance but before eviction (15). If the appreciation has been great, as where land bought for agricultural purposes has become valuable for city lots, or if the improvements have been expensive, as where large office buildings have been erected, this rule may bear with great hardship upon the grantee. But it will be seen that here is an unavoidable choice of evils. To allow the value at the time of eviction would bear with equal hardship upon the grantor.

§ 89. **Breach of covenant against encumbrances.** The covenant against encumbrances, like the covenant of seisin, is broken at the time of conveyance, if ever. Where the encumbrance is of such a nature that an eviction cannot be prevented by the covenantee, the measure of damages will be based upon the consideration paid, as in the case of eviction under a covenant of seisin or of quiet enjoyment (16); but, where no eviction occurs, recovery will be based upon the principle of indemnity, subject to the limitation that it cannot exceed the consideration paid. Thus, where land conveyed with a covenant against encumbrances was burdened with a permanent right of way, which actually reduced its value $750, the covenantee

(15) Pitcher v. Livingston, 4 Johns. 1.
(16) Stewart v. Drake, 9 N. J. L. 139.

recovered that amount (17). Where the encumbrance is a mortgage, which secures an amount less than the price paid for the land, the covenantee may pay the mortgage and recover the amount paid from the covenantor; but where he has done nothing toward removing it he can recover nothing (18). When the incumbrance involves a permanent impairment of value, which cannot be controlled by the purchaser, as in the case of the right of way, the right to indemnity is fixed; but where the encumbrance may be removed by a reasonable effort on the part of the purchaser, as in the case of a mortgage for less than the amount which he paid for the land, the encumbrance is not regarded as permanent and he recovers the cost of removing it only in case he actually incurs the expense of removal.

§ 90. **Effect of recital of consideration in deed.** Since the purchase price is so often the measure of damages, in actions upon covenants in deeds, it becomes important to inquire whether the consideration may be shown to have been other than that recited in the deed. Of course the recital is prima facie evidence of the amount paid—in the absence of evidence to the contrary it controls. But, as between the immediate parties, the consideration clause is open to explanation by extraneous evidence. Thus, where the consideration recited in the deed was $1,800, the plaintiff was allowed to enhance his damages by showing that the actual consideration was $2,800 (19); on the

(17) Mitchell v. Stanley, 44 Conn. 312.
(18) Tufts v. Adams, 8 Pick. 547.
(19) Belden v. Seymour, 8 Conn. 304.

other hand, where the consideration as recited was $900, the defendant was allowed to reduce the damages by showing that it was in fact only $100 (20). Naturally, a different rule prevails, when an action is brought by a remote grantee upon a covenant running with the land. He knows nothing of the transaction between the original parties except as it is expressed in the deed. Hence, it has been held that, in an action against the grantor by a remote grantee, the former could not reduce his damages by showing that the consideration actually received by him was less than the amount recited in his deed (21).

Section 3. Certain Miscellaneous Contracts.

§ 91. Contract to loan money. We have already seen that a contract to pay money takes a special rule. Although the person to whom money is due may sustain very substantial consequential damages as a result of its non-payment, he is nevertheless confined, by the rule of certainty, to a recovery of interest during the period of delay as his sole compensation for the inconvenience caused (22). He gets interest, because he has clearly lost the use of the money, and men ordinarily estimate the value of money's use in terms of interest. This principle has a singular result, when applied to a contract to loan money at some time in the future. When one who has agreed to loan money fails to provide it at the agreed time, it is plain that the would-be borrower will be deprived of its use. Accordingly it would seem that in such

(20) Morse v. Shattuck, 4 N. H. 229.
(21) Greenvault v. Davis, 4 Hill, 643.
(22) Greene v. Goddard, 9 Met. 212.

a case he should recover the interest, as representing the value of the use; but, as he would have to pay the money-lender interest in case he obtained the money, it is plain that by not obtaining the loan he saves as much as the law will admit that he has lost. Accordingly, in the ordinary case of refusal to loan in accordance with a contract, only nominal damages are recoverable (23).

§ 92. **Contract to pay another's debt.** A not uncommon type of contract is that in which one party agrees to pay a debt which the other party owes to a third person. If he does not pay as agreed, he obviously breaks his contract, and is therefore liable to the other contracting party (24). If the plaintiff in such an action has been compelled to pay the debt himself, it is plain that he has sustained actual damage to the extent of the amount paid. But suppose he has not paid when his action is brought; it is plain that he may never pay, and consequently may never sustain actual damage from the breach, in the sense of actual pecuniary loss. Nevertheless he is allowed to recover the full sum, on the theory that such was the intention of the parties (25).

§ 93. **Contracts of indemnity and insurance.** The last subsection deals with a case in which one person has practically agreed to step into another's shoes as debtor. It should be distinguished from a contract of indemnity. One person may agree to reimburse another, in case the other is compelled to pay a sum of money in discharge

(23) Gooden v. Moses, 99 Ala. 230.

(24) As to the third person's right, see the article on Contracts, §§ 92-100, in Volume I.

(25) Furnas v. Durgin, 119 Mass. 500.

of a liability. Or the law may treat him as though he had made such an agreement, as in the case of principal and surety. When the surety is compelled to pay, he is entitled to be fully indemnified by his principal. Accordingly, where he is compelled to pay by suit, which he has notified the principal to defend, he may recover his necessary costs (26). In the case of indemnity, actual loss is the test. Contracts of insurance against loss of property by fire or other casualty are essentially contracts of indemnity. Until the loss occurs nothing is due; when it does occur, the contract requires that the insurer must pay whatever loss is sustained, up to the amount for which insurance is carried (27). Of course the policy or insurance contract may expressly provide for the insurance of a limited interest, in which case the value of the interest will necessarily limit the recovery. However, the law permits one who is in possession of property to insure it for its full value, although his interest may be limited, and in the event of its loss or destruction, to recover the full value (28). It will be seen that this is a clear departure from the principle of indemnity. But it should not be supposed that the owner of a limited interest may permanently hold as his own the full amount thus recovered. He will, as a general rule, subject to exceptions concerning which the courts are not agreed, hold the amount recovered, beyond indemnity for his individual loss, as a trustee for the owners of the other in-

(26) Baker v. Martin, 3 Barb. 634.
(27) Underhill v. Agawam M. F. I. Co., 6 Cush. 440.
(28) De Forest v. Fulton F. I. Co., 1 Hall, 84.

terests (29). Different principles apply to life insurance contracts. The object of life insurance is not to indemnify the insured against a loss of property, but to provide for the payment of an agreed sum to the beneficiary upon the death of the insured. Upon the happening of that event the policy ripens into an obligation to pay a fixed sum of money, and is therefore subject to the ordinary measure of damages for the non-payment of money (30).

§ 94. **Contract to marry.** The so-called "breach of promise" suits occupy an anomolous position. A promise to marry does not differ in its nature from any other contractual promise. An action for its breach is essentially an action for breach of contract. Nevertheless such an action is, for the purpose of estimating damages, treated very much as an action of tort. As in the case of non-pecuniary actions of tort, the damages rest in the sound discretion of the jury. In estimating the damages, the jury may consider the temporal loss to the woman whose expectations have been disappointed; the mental suffering occasioned by the injury to her affections; and the humiliation and distress resulting from the defendant's refusal to carry out his promise (31). Exemplary damages are also recoverable; in aggravation the plaintiff may show that the defendant has falsely accused her of misconduct with other men (32), that she has been seduced under promise of marriage, or that such seduction has

(29) See the article on Insurance, §§ 145-48, in Volume VII.

(30) Trenton M. L. & F. I. Co. v. Johnson, 24 N. J. L. 576.

(31) Coolidge v. Neat, 129 Mass. 146.

(32) Berry v. Da Costa, L. R. 1 C. P. 331.

been followed by the birth of a child (33). In mitigation, the defendant may show that the plaintiff was addicted to lewdness or profanity, or that she did not really care for him, but sought to obtain his money, or to spite his family (34).

SECTION 4. TORTIOUS SEVERANCE FROM THE REALTY.

§ 95. **In general.** A wrongfully enters B's mine, breaks coal from its place in the vein, takes it to the mouth of the pit, and then transports it to market, where he sells it to C. Since the coal is B's property he may recover it in specie wherever he can find and identify it; but he may prefer to bring an action for damages, and, if the coal is not recoverable in specie, an action for damages will be his only available remedy. The facts stated give B a choice of actions against A, according as he relies upon the wrongful entry upon his land, or upon the taking or conversion of his personal property, as the gist of the action. The result is peculiar: A's labor has added value to the coal; B's actual damage is the same, whatever form of action he adopts; the actions open to B's choice differ from each other in the rules of damages to which they are respectively subject. Shall the form of action determine the rule of damages; or shall the substance govern; and, if the substance governs, shall A or B have the value of B's work? Different courts have made different answers.

§ 96. **When action is for trespass on land.** When the gist of the action is the wrongful entry upon the land,

(33) Sherman v. Rawson, 102 Mass. 395.
(34) Miller v. Rosier, 31 Mich. 475.

the taking and carrying away of the coal is regarded merely as aggravation of damages. In strictness the plaintiff recovers for the disturbance of his possession. He recovers for whatever damage is done to his land. If coal is taken, he should have the diminished value of his land. This would naturally include the value of the coal in place, and any consequential damage to the land occasioned by the process of removal, as, for instance, subsidence of the soil. So, if trees are taken, the diminished value of the land is the criterion. If they are shade trees, the damage would by no means be represented by the value of the trees as timber, any more than damage for the removal of a growing crop would be measured by the forage value of the crop, after severance. When this form of action is chosen, the damage to the land, regardless of the subsequent history of the property severed, would seem the sound as well as the strict rule of damages (35). All courts would allow the plaintiff to recover at least that much; but some would not stop there.

§ 97. **When action is for trespass to personal property.** However, the plaintiff may claim no damages for the injury to his soil. He may waive the trespass upon the land, and claim compensation for the taking and carrying away of his goods and chattels. In strictness, the coal is a part of the land until it is severed. At the completion of the work of severance, it has for the first time become a chattel. The chattel still belongs to the owner of the soil. He now claims damages for its taking as a

(35) Foote v. Merrill, 54 N. H. 490.

chattel. In strictness, its value at the moment of complete severance is the proper measure of damages in this form of action (36). And yet the courts are not agreed as to when the value should be estimated.

§ 98. **When action is for conversion of personal property.** When the action is for the conversion of the coal as a chattel, it is obvious that no recovery may be had for consequential damage to the land as such, but a question will remain as to when the value of the coal should be estimated. Here, as in the case of trespass to personalty, it is evident that in strictness the plaintiff should at least recover the value of the coal when it first became a chattel. On the other hand, a peculiarity of the tort of conversion is that there may be successive conversions of the same chattel by the same person. If, for instance, after A has taken B's coal and transported it to market, B there demands it from A and A refuses to deliver it, there is perhaps a new conversion. In strictness, it seems difficult to deny B's right to recover the full value at the time and place of the new conversion, if he makes that conversion the gist of an action of trover (37). On the other hand, if there is no evidence of a new conversion, the value of the coal at the time of the conversion, which was the instant it became a chattel, seems, on technical grounds, the true measure of damages in this form of action, as well as when the action is for trespass to personalty (38). But here too the courts differ widely

(36) Cushing v. Longfellow, 26 Me. 306.
(37) Moody v. Whitney, 38 Me. 177.
(38) White v. Yawkey, 108 Ala. 270.

§ 99. **Prevailing tendency to disregard forms.** It seems that where the plaintiff wishes compensation for the damage to his land as such, he must make the wrongful entry the basis of his action; but, when he seeks compensation for the loss of his chattels, whether they be minerals or timber, he will find most courts disposed to disregard the limitations imposed by the mere form of action and to award damages upon broad principles of justice. The wrong-doer's motive is made an important factor. If he has acted under an innocent mistake of fact, the tendency is to give to him whatever value his own labor may have added to the property taken; to require him, in ordinary cases, to pay the value of the coal in place, or of the timber as it stood, before his legally wrongful, but morally innocent, act in severing it from the realty. Thus in a leading case (39), where the defendant innocently went beyond his line in mining coal, and mined and carried away some of plaintiff's coal, it was held, in an action of trover, that the true measure of damages was the value of the coal in place and not as it lay in the pit after severance. After conceding that, if the form of action were to control, the value after severance should be adopted, the court rejected this criterion and said: "We prefer the rule in Wood v. Moorehead (40), where Parke, B., decided, in a case of trover for taking coals, that if the defendant acted fairly and honestly, in the full belief of his right, then the measure of damages is the fair value of the coals, as if the coal-field had been purchased from the plaintiffs." This case illustrates a strong ten-

(39) Forsyth v. Wells, 41 Pa. 291.
(40) 3 Q. B. 440, n.

dency of the decisions; but it must be confessed that there is great divergence of authority. Even where the courts agree that substance and not form should control the measure of damages, they are not always agreed as to what substantial compensation involves. It need not be said that the same principles apply where timber has been severed, as in the case of minerals. Compare the article on Personal Property, §§ 23-28, in Volume IV of this work.

Section 5. Death by Wrongful Act.

§ 100. In general. At common law the death of a human being put an end to all right of recovery for personal injury sustained by him; in other words, actions for personal injury did not survive the death of the injured. By the same law, death itself gives no right of action to anyone; neither his personal representatives nor his immediate family may maintain a civil action therefor. Upon these doctrines of the common law, legislation has made great inroads. Under statutes in many states, actions for personal injuries survive the death of the person injured. Such statutes present no new problem in damages; no new action is created, the old one simply survives; compensation is allowed the estate for damage which the decedent himself sustained. But another and larger group of statutes have created a new cause of action; everywhere in this country, as well as in England, the death of one person, as a proximate consequence of another's wrongful act, gives a right of action either to the personal representatives of the deceased or to specified members of his family. More commonly the members

of the immediate family, such as the parents, children, brothers, and sisters are the beneficiaries; but the statutes vary as to the beneficiaries designated. Usually a definite sum, as $5000, is named as the limit of recovery, but sometimes no limit is specified. Where the amount is limited, those entitled must share in proportion to the losses which they have respectively suffered; where the amount is not limited, recovery is upon the basis of compensation for loss actually sustained. As a rule recovery is limited by these statutes to losses that are *pecuniary*. The special problem of damages presented is to ascertain what losses are deemed pecuniary, within the meaning of these acts.

§ 101. Basis of recovery: Pain and suffering of deceased. Under a statute providing for the survival of actions for personal injury, it is obvious that damages ought to be allowed for the pain and suffering of the deceased, upon the same principles that would have governed his recovery had he lived to maintain the action himself. The cause of action remains the same; such a statute merely prevents the action from dying with the person. But, under a statute which gives a new action for pecuniary loss caused the family of deceased, it is equally obvious that the damage caused the deceased during his lifetime is quite immaterial upon the question of damages (41). And, unless the statute awards exemplary damages, which is usually not the case, it is equally immaterial whether the death was caused wilfully or negligently.

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(41) Dwyer v. C., St. P., M. & O. Ry. Co., 84 Iowa, 479.

§ 102. **Same: Grief and loss of society.** In a normal family the death of one of its members is felt least of all as a pecuniary loss, but this is the only loss which the statute attempts to compensate. In the language of one of the decisions: "It must be borne in mind that the recovery allowable is in no sense a solatium for the grief of the living, occasioned by the death of a relative or friend, however dear. It is only for the pecuniary loss resulting to the living party entitled to sue, resulting from the death of the deceased, that the statute affords compensation. This may seem cold and mercenary, but it is unquestionably the law" (42). Upon this principle it was held reversible error for a trial court to admit in evidence a photograph of the deceased (43).

§ 103. **Same: Evidence of pecuniary damage.** However, it must not be supposed that the pecuniary loss need be shown with mathematical exactness. The mere possibility of pecuniary loss will not be enough to ground the action, but a probability of loss is enough. Where the deceased had accumulated nothing during his lifetime, it was held error to call the jury's attention to the possibility of his having accumulated property which the beneficiaries might have inherited (44); but, in an action brought by the aged and infirm father of the deceased, the fact that the deceased had five or six years before his death given the plaintiff money when the latter was out of work was held sufficient evidence of reasonable pecuniary

(42) Pierce v. Conners, 20 Colo. 178.
(43) Smith v. Lehigh Valley R. Co., 177 N. Y. 379.
(44) Wiest v. Electric Traction Co., 200 Pa. 148.

expectation (45). And, it has been held by a court which refuses compensation for sorrow and mental anguish caused by death, that, in an action by the widow for the death of her husband, evidence of their kindly relations was admissible upon the question of pecuniary loss (46). As to the admissibility of evidence that the statutory beneficiaries have received money on policies of insurance upon the life of the deceased, or have inherited property from the deceased, authorities differ (47).

§ 104. **Same: Excessive verdicts.** From an actual case of a typical character, something may be learned as to the measure of damages in this class of cases. The defendant railroad had caused the death of plaintiff's father by its negligence. The court instructed the jury that their recovery must be limited to the sum which the father, by his personal exertions, less his necessary personal expenses and those of his wife during her life, would have added to his estate, and which would have descended to the plaintiffs as his heirs at law. Upon the trial it appeared that the deceased was at the time of his death about 68 years of age, that his expectancy of life was 9½ years; that he was then earning $2000 per year as a bank employe, conveyancer, and notary; that his annual expenses were about $1000. Under these instructions and upon this evidence, the jury returned a verdict of $4000 in favor of plaintiffs. Approving the instructions and conceding that, had he lived the full term of his expectancy, and remained able during all that time to

(45) Hetherington v. Ry. Co., 9 Q. B. D. 160.
(46) Beeson v. Mining Co., 57 Cal. 20.
(47) S. A. & A. P. Ry. Co. v. Long, 87 Tex. 148.

engage in the work in which he was employed at the time of his death, his net earnings would have considerably exceeded the amount of the verdict, the court held that the sum awarded was nevertheless excessive (48). Said the court in part:

"It cannot be fairly assumed, however, or expected, that, at his advanced age, he would have continued to labor during all the future years of his life. In considering this question, account should be taken of his liability to illness, his incapability of further exertions by reason of age, and that he might, on account of his years, conclude to retire from active work; that, in all probability, his age would soon incapacitate him from discharging his duties as an employe in the bank in which he was engaged; that, if he did continue to earn money for a portion of his expectancy of life, he would at least expend a part so earned for personal use during the remaining years. All these are contingencies which must be considered. Necessarily, the ascertainment of damages, dependent upon a variety of circumstances and future contingencies, is difficult of exact computation; but, nevertheless, they cannot be presumed and arbitrarily given. Undoubtedly much latitude must be given a jury in cases of this character, but there must be some basis of facts upon which to predicate a finding of substantial pecuniary loss."

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(48) D. & R. G. R. Co. v. Spencer, 27 Colo. 313.

BANKRUPTCY

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BANKRUPTCY.

§ 1. Outline. The purpose of the article on bankruptcy is to give a brief historical sketch of the origin of bankruptcy law, its development in England, its adoption, modification, and development in the United States, with some slight attention to the insolvency laws that have been adopted by the various states of the Union. Some attention will also be given, in passing, to the various early bankruptcy acts passed by Congress, but particular emphasis will be placed upon the most recent act, passed by Congress in 1898, as amended in 1903, and again in 1906. To deal with matters of court procedure in that Act would be of benefit only to a practicing attorney, and this feature will be left almost entirely untouched. A

somewhat detailed examination, however, of the substantive, as distinguished from mere procedural aspects of the Act, will be attempted. Two general classes of acts known as acts of bankruptcy will require attention. First, the law of fraudulent conveyances as developed at common law and under the statute of Elizabeth, and how that law has been engrafted upon the national Act to define certain acts of bankruptcy. Second, acts of bankruptcy that had no existence at common law, but were deemed by it to be inoffensive. These are the result of modern legislation. Other substantive features of the law to be examined are the following: Who may be a bankrupt, who may be petitioning creditors, the duties and powers of the trustee, what property passes to him, what are the sources of his title, what claims are provable, and the application for, opposition to, and effect of a discharge. In conclusion a brief statement will be made of some of the advantages of a national bankruptcy law as contrasted with separate laws on that subject in the various states.

CHAPTER I.

HISTORY OF BANKRUPTCY LEGISLATION.

§ 2. **Earliest traces of elements of bankruptcy law.** Legal historians have pointed to the Jewish law of biblical times, which commanded creditors to release their debtors from all debts at the end of every seventh year, as furnishing the earliest trace of one of the essential elements of a modern code of bankruptcy. The Roman law of the time of Julius Caesar permitted a debtor to make what today would be deemed an assignment for the benefit of his creditors. By so doing he became entitled to a release, not as modern bankrupts do, from the unpaid portion of his debts, but from the payment of the severe penalty of capital punishment, imprisonment, or slavery. The assignment and partial release features are elements of bankruptcy law.

§ 3. **Increasing complexity of business demands bankruptcy legislation.** In the early times just mentioned, trading was limited. The chief occupations were those of farming and grazing. Under such simple social conditions a complete bankruptcy system was quite unnecessary. The early and simple forms of relief to creditors, who were usually few in number, were adequate. The people who first made bankruptcy law a fixed part of their code were the English. But even in England the rural

life and simplicity of business conditions prevailed to such an extent, even down far into the sixteenth century, that the creditor class considered the remedy of execution and attachment adequate. Civilization advanced, wants increased, and manufacturers no longer waited for an order before they began work but manufactured in quantity with the expectation of future sale in season. Traders bought in quantity on credit in advance; merchants did not confine their purchases and sales to a few persons, but bought from and sold to many everywhere. When failures came, and the diligent creditor with his execution ahead of others took all the debtor's property to satisfy his claim, the others saw the injustice, and relief was demanded.

§ 4. **Earliest English bankruptcy law.** The common law was inadequate to procure an equitable adjustment of the rights of creditors, where equality appealed to men's reason. It was under such conditions that England in 1542 passed its first so-called bankruptcy law. Its chief features deserve mention. Only merchants and traders were amenable to it, and, doubtless, others were not clamoring for its burdens, for it was a law directed *against* fraudulent debtors. It provided for the seizure of a debtor's property and its pro rata distribution among his creditors, but omitted entirely to give to him a release of any kind, even from imprisonment for debt. It was a law to punish fraudulent debtors, a quasi-criminal statute, and aimed to prevent debtors avoiding service of process by keeping to their homes or departing from the realm.

§ 5. **Progress in bankruptcy legislation.** While changes were made from time to time in the law just mentioned, they were not marked, and it was not until 1705, over 160 years after the first law was passed, that Parliament saw fit to give to the *debtor* some measure of attention, the benefits of such legislation having been for only the creditor theretofore. In that year a law was passed, known as Queen Anne's act, which, containing the elements of the prior law, also gave the debtor a release from the portion of his debts remaining unpaid after the distribution of his property. The delegates assembled in the Federal constitutional convention in 1787, evidently realizing the intimate connection with and the importance to commerce of a system of bankruptcy laws, inserted in the Constitution a provision giving Congress power, not only over commerce in general between the states, but power to make uniform laws on the subject of bankruptcies throughout the United States (1). This was the earliest expression on the subject given by the Union.

§ 6. **Bankruptcy legislation in the United States.** Such was the legislation in England and such the fundamental features of its law, when Congress in 1800 set about providing its first uniform system of bankruptcy. It is little wonder, therefore, there being but incomplete systems in the states, that the English law became almost an exact model for the law of 1800, which remained in force only four years.

Not until 1841 did Congress again exercise its power under the Constitution, but at this time it grappled with

(1) U. S. Const., Art. I, sec. 8, § 4.

the problem as would a body of iconoclasts and broke away from the narrower acts that had existed in the past. This law was not one to be invoked by the creditors only, but could be set in motion by the debtor himself, a feature which English legislation had not at that time formally recognized; and, furthermore, not only merchants and traders could set it in motion, but other persons as well. While it retained all the important features of bankruptcy legislation as it existed in England at the time of the adoption of the Constitution, it added to them the features mentioned, and for the first time gave what has been termed by authorities a *modern* bankruptcy law. Congress repealed the law in less than two years.

In 1867 a third law was passed, which, owing to its being the copy from which the law of 1898 was taken, will not be closely examined, but attention will be given to the latter law as it exists and is enforced today and, in its study, reference will be made where advisable to the law of 1867. Some few decisions of the courts based on that law will also be used, where similar questions are presented for solution under the two statutes.

§ 7. **State versus Federal bankruptcy laws.** The Constitution gave Congress the power to pass bankruptcy laws. From the preceding statement it may be seen that it has exercised it at four different times, but long periods of time have elapsed between the repeal of one law and the passage of another. During these periods state bankruptcy laws are operative and in full force. Some states have what may be deemed modern bankruptcy laws

(2) while others are only insolvent or poor debtors' acts and stand midway between the common law and a modern system in their operation and effect. When Congress passes an act it operates to suspend all state bankruptcy laws except as to subjects covered by state laws and not covered by the national Act, as will be more clearly illuslustrated in the next chapter, §§ 10-14. By suspension is not meant a repeal but merely causing to be dormant, and when the Federal law is repealed such laws spring again into full force. They are effective then, not only to punish acts done after the repeal but even before the repeal, which were not taken advantage of to institute proceedings under the national Act.

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(2) Rhode Island passed such a statute as late as May 26, 1908. See R. I. Laws, 1908, c. 1577.

CHAPTER II.

BANKRUPTS AND PETITIONING CREDITORS.

Section 1. Who May Be Bankrupt.

§ 8. **Voluntary and involuntary bankrupts.** As stated above, the earliest bankruptcy laws both in England and in the United States permitted only involuntary proceedings. By this is meant that a party could be a bankrupt only in the event that he did some act, designated by law, as a consequence of which the creditor or creditors injured could proceed against him, compel him to give up his property, submit to the conditions imposed, and accept the benefits, if any, if not, then the burdens, of the bankruptcy law. Thus, involuntary proceedings are those which creditors take to force a debtor to become a bankrupt. When a debtor, however, found his circumstances such as to make him desirous of going through bankruptcy on his own initiative, he could not do so. It suggested itself at once to shrewd debtors to induce friendly creditors to take the necessary proceedings. In the course of the development of the laws, the voluntary feature was annexed, whereby it became possible for a debtor to make application to a court of bankruptcy on his own motion, without the necessity of resorting to the collusive method mentioned, surrender his property, and be made a bankrupt.

The two methods of becoming a bankrupt exist in the law of 1898, but not all persons, treating corporations as artificial persons, are amenable to the law in involuntary proceedings, nor are all persons capable of instituting voluntary proceedings. The lines drawn by the law will now be examined.

§ 9. **Who may be voluntary bankrupts?** All natural persons may be voluntary bankrupts (1). Farmers, wage earners, traders, private bankers, in fact, any natural person owing debts may be a voluntary bankrupt, entirely regardless of the amount of his debts, of the relation between the amount of the debts and the value of his assets, or of the question whether he had any assets at all. A person having enough property to pay his debts in full, who desires to discontinue business, may file a petition in the Federal courts and have his property taken by an officer of that court and the proceeds distributed among his creditors, thus relieving himself from the time, care, and expense of disposing of the assets and paying the debts. A debtor owing but a single debt may take voluntary proceedings. The petitioner must, however, have had his principal place of business, resided, or had his domicile, for the preceding six months or the greater part thereof, within the territorial jurisdiction of the court wherein he files his petition (2).

That form of business association known as a partner-

(1) Sec. 4a. Note.—The references herein made to a section, as Sec. 4a, refer to the sections of the law of 1898 as amended in 1903 and 1906. A convenient pamphlet form of the law can be had by applying to Congressmen.

(2) In re Plotke, 104 Fed. 964; Sec. 2 (1).

ship may be a voluntary bankrupt (3). One of the partners may make the application and the partnership be adjudged a bankrupt, or both the partnership and all the individuals may join and be made bankrupts. Furthermore, married women (where by the law they may own separate property and incur liabilities) and infants may be voluntary bankrupts. Even aliens may be voluntary bankrupts, if they have property in the court's jurisdiction. As to them the requirement of domicile, residence, or principal place of business, in the territorial jurisdiction of the court is dispensed with by the provision of the Act (4).

§ 10. **Who may be involuntary bankrupts?** As stated, all natural persons may be voluntary bankrupts. The law expressly provides that artificial persons cannot be voluntary bankrupts, and its constitutionality has been unsuccessfully attacked on the ground that the classification permitting natural persons to invoke the law and denying the artificial persons that right violated the uniformity requirement of the Constitution (5). All natural persons owing debts amounting to one thousand dollars or over, except wage earners (i. e., those employed for wages, salary, or hire at a rate not exceeding one thousand five hundred dollars a year) and those engaged in farming or the tilling of the soil, may be involuntary bankrupts (6). Among the natural persons would be classed the business partnership or unincorporated com-

(3) Sec. 5a.
(4) Sec. 2 (1).
(5) Leidigh Carriage Co. v. Stengel, 95 Fed. 637. Decision by Taft, J.
(6) Sec. 1a (27); sec. 4b.

pany and those mentioned in the preceding subsection that may be voluntary bankrupts, except the wage earners and farmers. A limited number of artificial persons, i. e., corporations, may be made involuntary bankrupts. Thus, those corporations engaged principally in manufacturing, trading, printing, publishing, mining, or mercantile pursuits may be adjudged involuntary bankrupts, in case they owe at least one thousand dollars in debts (7). So the classification itself fixes a narrow limit upon the corporations that may be made involuntary bankrupts.

§ 11. **Inclusion of corporations strictly construed.** The act not only fixes a narrow limit upon what corporations may be involuntary bankrupts, but the courts have been illiberal in their construction of the law, and, instead of giving latitude to such a term as "mercantile pursuits," so as to include all corporations engaged in any business for profit as distinguished from religious, eleemosynary, charitable, social, and fraternal corporations, they have narrowed it so that it is practically no broader than the term "trading," which is given its ordinary signification of buying and selling articles of commerce for profit. Buying and selling real estate is not included, because it is not an article of commerce (8).

§ 12. **Same: Examples.** Thus, corporations engaged in a carrying and transportation business, such as railroads, pipe lines for forwarding oil or water, and car-

(7) Sec. 4b.
(8) In re Kingston Realty Co., 160 Fed. 445.

riers of electricity are not subject to the law (9). Again, those engaged in construction work, manufacturing articles attached to the soil as distinguished from those that are freely moving articles of trade, such as corporations engaged in erecting concrete arches, constructing dams, bridges, and houses are, according to the interpretation given by the courts, not amenable to the law (10). This narrow interpretation given by the courts has led to agitation for provisions in the law permitting more corporations to be made amenable. Amendments were proposed in Congress in 1908 and 1909, by which "any monied business or commercial corporation," the language of the Act of 1867 (11), was sought to be substituted for the present provision, but which failed to become a law. Such a change would have the effect of nullifying many strained constructions of the Act, would simplify it to a considerable degree, rendering it at least easy to know what corporations are excluded from the terms of the Act, and would seem a desirable result to accomplish.

By express language, state and national banks are excepted from the operation of the law, the evident intent of the lawmakers being that the affairs of those institutions that fail should be left to be administered by the state and national banking laws.

The jurisdictional requirements that the alleged bankrupt have his domicile, residence, or principal place of

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(9) In re New York, etc. Water Co., 98 Fed. 711; Re Hudson River Co., 167 Fed. 986.

(10) Hall Co. v. Friday, 158 Fed. 593; In re Kingston Co., 160 Fed. 445.

(11) In re Quimby Forwarding Co., 121 Fed. 139.

business in the district where proceedings are instituted are the same for involuntary bankrupts as for voluntary (see § 9, above).

§ 13. State bankruptcy laws operative where Federal law does not apply. It is not to be understood that because certain persons both natural and artificial may not be made involuntary bankrupts by the Federal bankruptcy law, they cannot be made amenable to bankruptcy at all. Congress did not expressly make the law it passed an exclusive law on the subject of bankruptcies, thus suspending all state laws and every portion of them, nor can an intention to have it so interpreted be gathered from the Act. Thus it follows that persons not amenable to the national law may nevertheless be made bankrupts under the state law, if one exists, with features admitting it, in the presence of the national law. It does not follow, however, merely because the state and the Federal law both cover the same field that a person may be amenable to the state law, for, wherever they do so overlap, the Federal Act is exclusive and controls. Illustrating this principle, it has been held that a farmer, who may not be adjudged an involuntary bankrupt under the Act, may nevertheless be forced into bankruptcy under a state law permitting it (12); that persons owing less than the amount fixed by the Federal law to make them amenable to it at the suit of creditors (13); or a corporation not amenable to it at all (14) may be adjudged involuntary

(12) Old Town Bank of Baltimore v. McCormick, 96 Md. 341.

(13) Shepardson's Appeal, 36 Conn. 23.

(14) Herron Co. v. Superior Court, 136 Cal. 279. A mining corporation was adjudicated an involuntary bankrupt, before the Act was amended so as to make a mining corporation amenable.

bankrupts under a state law providing for it. The Federal system suspends the state systems wherever they overlap; where they do not, they work in perfect harmony and conjunction.

§ 14. Business in which corporation is engaged and not charter powers control. The law states that a corporation, if engaged principally in manufacturing, etc., may be forced into bankruptcy, and the question has frequently arisen whether the business for which it was incorporated would control or the business it actually carried on, and the courts have held that the latter controlled (15).

Section 2. Petitioning Creditors.

§ 15. Explanation of term. Involuntary proceedings are those that are instituted by others against the debtor, and consequently a moving party or parties are required. Those that set in motion the machinery of the courts to bring about the bankruptcy of another are called *petitioning creditors,* because they join in a petition setting out facts sufficient to give the court jurisdiction and power to enter a decree of adjudication. Among these facts are the act of bankruptcy, and, if a corporation, the business in which it is principally engaged, the duration of the residence, domicile, or principal place of business of the alleged bankrupt in the court's territorial jurisdiction, the amount owed petitioning creditors, etc.

§ 16. Who may be petitioning creditors? It has been shown that in voluntary proceedings the debtor himself is the moving party, and when seeking the jurisdiction of

(15) In re Tontine Surety Co., 116 Fed. 401.

a bankruptcy court he himself files a petition asking that he be adjudged a bankrupt. The proceeding is less simple in involuntary cases, as the qualification of petitioning creditors, the number required, the commission of an act of bankruptcy by the alleged bankrupt, and similar questions tend to complicate it. As a general rule all persons having provable claims against an alleged bankrupt may be petitioning creditors (16). Who have provable claims is fixed by the law and will be fully considered later (17).

§ 17. **Number of petitioning creditors required.** The law provides that, if there are twelve or more creditors having provable claims, then at least three creditors must join in the petition; and, furthermore, the aggregate of the claims of those creditors must be five hundred dollars or over. If, however, the alleged bankrupt has less than twelve creditors, one petitioning creditor whose claim amounts to five hundred dollars or more may file the petition (18). The petitioning creditor or creditors through this petition present to the court the facts with reference to the alleged bankrupt, upon which they rely to compel him to surrender his property to the court to be administered for the benefit of all the creditors. In order that he may be made a party to the proceeding, it is required that he be summoned to appear before the court to show why he should not be dealt with under the bankruptcy law.

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(16) Sec. 59b.
(17) Sec. 63. See Chapter V, below.
(18) Sec. 59b.

§ 18. Limitations upon rights of creditors to join in petition. The most obvious limitation upon the right of creditors to join in a petition is that pointed out by the law itself, which denies to the creditor the right to petition in respect to any portion of his claim that is covered by securities held by him (19). This leads logically to the conclusion that creditors holding claims that are entirely secured cannot join in a petition, unless they give up their security and proceed as unsecured creditors (20). A secured creditor is not one holding a claim secured merely by the *personal* obligation of another, or even by *property* of the surety or guarantor whose personal obligation secures it, but he is one who either holds property himself which belongs to the bankrupt which the latter has pledged, to secure the claim, or has recourse to the bankrupt's property in the hands of the debtor's surety to whom it was pledged as security. The test of a secured creditor is whether his claim will either directly through himself or indirectly through some third person, who has become a surety or guarantor of the claim, draw or withdraw some specific portion of the debtor's property from the assets available to pay general creditors (21).

Another limitation upon such right is that presented by a situation where creditors have assented to or joined in the execution of a deed of assignment for the benefit of the creditors. Such an assent, where the act of making the assignment is relied on in the petition against the al-

(19) Sec. 59b.
(20) Re Alexander, 1 Lowell, 470.
(21) Sec. 1a (23).

leged bankrupt as the act of bankruptcy, incapacitates the assenting creditors from joining in the petition. The law does not tolerate such inconsistent action on the part of creditors, and they cannot at one time give their approval to the execution of a deed of assignment, and at a later time attack the assignment and make it the basis of a proceeding to put the assignor into bankruptcy (22).

(22) In re Romanow, 92 Fed. 510.

CHAPTER III.

ACTS OF BANKRUPTCY.

§ 19. Act of bankruptcy necessary for involuntary proceedings. In the earliest English bankruptcy legislation, creditors could proceed against a debtor only in case he had violated some specific provision of a statute, and had, so to speak, committed a quasi-criminal offense. Such a requirement still persists. Under the present law creditors are required to show that the debtor, either of his own volition or from unavoidable circumstances, has affirmatively perpetrated some act prohibited by it, or by inaction has left something undone which he should have done, before they can subject him to its provisions as to surrender of property, distribution of assets, and other features. To state the same thing more briefly, they are required to show that he has committed one or more of several so-called *acts of bankruptcy* (1).

§ 20. Act of bankruptcy not essential in voluntary proceedings. While it is necessary in involuntary proceedings for creditors to establish some act done by a debtor prohibited by the statute, this is not true in cases where a debtor seeks the jurisdiction of a bankruptcy court of his own motion. He may invoke that jurisdiction with no other motive than that of being relieved of the burden of

(1) Sec. 3a.

distributing his property at his own expense, rather than at the expense of his creditors. Thus, he may have sufficient property to meet all of his debts and desire to discontinue business, but be reluctant to assume the task of selling his property and turning it into money for his creditors. He may cast this responsibility on them by surrendering it as stated, and in the end procure from the court a discharge from his liabilities without any act of bankruptcy. An examination of the various acts of bankruptcy follows.

§ 21. Fraudulent conveyances: Statute of Elizabeth. The foundation of the first act of bankruptcy, that of conveying property with intent to hinder, delay, and defraud creditors (2)—more commonly styled making a fraudulent conveyance—is historically traceable to a period of time antedating the earliest English bankruptcy legislation. Creditors had certain recognized rights in fraudulent conveyances at common law. But in the year 1570 the English Parliament passed an act with reference to such conveyances. It is always referred to in bankruptcy and insolvency matters as the statute of Elizabeth. It made it a criminal offense knowingly to participate in a conveyance made by a debtor with an intent to defraud his creditors, and declared that such conveyances should be void as to them; but protected purchasers of the property in any rights they acquired without knowledge of the fraud. This statute was largely declaratory of the common law. Since its passage it is generally looked upon as the source of the rights of credi-

(2) Sec. 3a (1).

tors to defeat fraudulent conveyances. The creditor's remedy at common law and under this statute is simple. He realizes his claim out of his debtor's property by proceeding against it by attachment or execution, as if the title or possession or both were still in the debtor. He seizes and sells it as if it were still the debtor's property. If it cannot be sold advantageously by reason of a cloud on the title created by the deed of conveyance, as often happens in the case of land, he may proceed in equity to remove the cloud.

§ 22. **Same: In bankruptcy act.** As this statute existed before the settlement of the colonies, it is deemed a part of the common law of the states and regulates the rights of creditors in fraudulent conveyances even today, subject to certain modifications and developments. It was this historical, part common law and part statutory, conception of a fraudulent conveyance as developed in the various states that Congress intended to be applied in determining when a debtor has violated this section of the bankruptcy law (3). As there are numerous conveyances which the common law pronounces fraudulent toward creditors—the machinations of debtors to cheat their creditors having assumed as many forms as human ingenuity could invent—and which are, therefore, considered acts of bankruptcy, an examination of some of them to ascertain their peculiar characteristics and also the underlying principles of the common law and statute of Elizabeth is essential to a correct understanding of

(3) Lansing Boiler Works v. Ryerson, 128 Fed. 701.

what constitutes a violation of the section of the statute prohibiting such conveyances.

§ 23. **Retention of possession by seller.** It is a rule under the common law and statute of Elizabeth, that, if a debtor makes a transfer of chattels by bill of sale and remains in possession of them, with no circumstances tending to explain his retention of possession, the transfer is a fraudulent conveyance. Thus, in an English case, where a debtor owed the plaintiff £22 for goods sold and the defendant £191 for money lent, he purported by bill of sale to transfer his entire household furniture and stock in trade to the defendant as security in payment of the debt, but remained in possession of the property; the court held that the conveyance was fraudulent and void as to the plaintiff, saying: "If a man sells goods and still continues in possession as visible owner of them, such sale is fraudulent and void as to creditors, and the law has been always so held" (4). Other cases have taken a less strict view, holding on a similar set of facts, that the retention of possession was merely some evidence of an intent to execute a fraudulent conveyance, but might be rebutted (5).

§ 24. **Conveyances in consideration of support of grantor.** Another form of conveyance which the courts have held fraudulent is that of a debtor transferring his property to another for the latter's promise to support him during the remainder of his life. This is the rule even where the debtor has no actual intent to hinder his

(4) Edwards v. Harben, 2 Term Reports, 587.
(5) Martindale v. Booth, 3 B. & A. 498.

creditors. Thus, in one case, a debtor who was seventy-two years old conveyed his house and lot to another for the latter's agreement to support him the rest of his life. At the time of the conveyance the debtor supposed he had paid all his debts, but it transpired later that he had certain creditors. The court held the conveyance was void as to those creditors (6). And this seems to be the rule even though there is every possibility of the debtor's living sufficiently long to make the property transferred in the conveyance only reasonably adequate compensation for the support promised. The underlying objection is the transformation of the property into a form upon which creditors cannot realize, although the promise to support received in return was adequate value for the property conveyed away. The rule in the various states is almost uniformly in accord with that illustrated by the instance given. But in England it seems a different rule prevails (7).

§ 25. **Inadequacy of price.** In the preceding subsection the debtor received what ordinarily would be deemed full compensation for the transfer, yet creditors may attack such a conveyance owing to the fact that the compensation was inadequate in that it was unavailable to them. Some courts have held that a sale by a debtor of property for which he received an inadequate price is fraudulent and may be avoided. Thus, it was held that the conveyance of land worth two thousand dollars for the consideration of one hundred dollars was fraudulent, as a

(6) Egery v. Johnson, 70 Me. 258.
(7) In re Johnson, 20 Ch. Div. 389.

matter of law, leaving no question of fact even to be decided by a jury (8). Upon such facts many courts would say that the jury should be permitted to say whether the conveyance was fraudulent, while others say that these are not even inferences from which a jury can reasonably find that the conveyance was intended to be fraudulent (9). It would seem that the rule ought to be that it is some evidence, which may be taken into consideration by the jury or court with other facts in determining whether the debtor intended to defraud his creditors.

§ 26. **Conveyance upon secret trust.** A conveyance of property by a debtor to another, with a secret understanding between them that the latter is merely to hold it in trust for him for a time until financial troubles shall have passed, is void, and may be attacked by creditors who are prejudiced by it. The rule is the same where the conveyance is made to secure advances, but the deed of conveyance, which far exceeds in value the amount of the loan, is made absolute, with the secret understanding that it is to operate as a mortgage instead of making the deed in form a mortgage. Thus, a debtor conveyed land exceeding in value the sum of two thousand dollars advanced to him as a loan. The deed purported to convey a title absolute. The intention of the parties was, in fact, that the title should be held merely as a security for the loan, and, when that was repaid, it should be reconveyed. It was held that the deed was void (10). In such a case, where there is no actual intent to defraud, but merely cir-

(8) Scoggin v. Schloath, 15 Ore. 380.
(9) Jaeger v. Kelly, 52 N. Y. 274.
(10) Stratton v. Putney, 63 N. H. 577.

cumstances from which courts presume such an intent, the transferee may attach a lien to the land for the loan he made in good faith.

§ 27. **Conveyances both to pay past debt and to defraud creditors.** The law discourages a conveyance of property, part of which is to be applied in payment of an honest debt and the balance to be held by the transferee in trust to prevent creditors from getting it. If the transferee knows and participates in the debtor's intent to defraud his creditors, the conveyance cannot stand to any amount against the creditors. They may set it aside without permitting the transferee to retain a lien on the property for the amount of his honest claim. A grantor of land was indebted to another in the sum of eight thousand dollars. To pay the latter he deeded him land which was worth much more than the amount of his claim. In order to make the transaction appear fair, the debtor and creditor jointly fabricated a fictitious debt for board and washing. The court held the conveyance was fraudulent as to creditors, and refused to permit a lien to be attached for the honest debt of eight thousand dollars, saying: "The contention that the conveyance may be sustained to the extent of the adequate and honest part of the consideration is fully answered by the authorities, which hold that when the deed is fraudulent against creditors it is wholly void and cannot stand to any extent as security or indemnity" (11).

§ 28. **Preferment of creditors.** At common law debtors were permitted to prefer creditors if they desired. By

(11) Baldwin v. Short, 125 N. Y. 553.

giving a preference is meant the payment to one creditor of an honest debt without paying a like proportion to others. And a debtor could do this, if he did it with the actual intention of making payment merely, even though he intended not to pay others and even though the creditor paid knew this fact. In a certain case a husband had land, for which he had made payment, conveyed to his wife in satisfaction of a debt he owed her for money she had loaned him after their marriage. The court held the conveyance could not be attacked by creditors. It arrived at this conclusion although the debt to the wife was barred by the statute of limitations (12). From this case may be deduced the principle that at common law and under the statute of Elizabeth it was not a fraud upon creditors for a debtor to pay one of his creditors in full to the exclusion of others.

§ 29. **Exchanging non-exempt for exempt property.** The universal rule in the various states allows a debtor, who owns non-exempt property, to exchange it for or invest it in exempt property, which creditors cannot take from him to satisfy their claims, without permitting the unpaid creditors to take any advantage of his action. A Nebraska farmer owned a farm worth sixty-one hundred dollars of which two thousand dollars were exempt from creditors and forty-one hundred not exempt. He sold this farm and invested all the money in a Kansas farm, all of which was exempt by the law of the latter state. A party who was a creditor while he owned the Nebraska farm sought to collect his claim out of the Kansas land

(12) French v. Motley, 63 Me. 326.

The court held he could not do this, as the debtor had a right to transform his property from non-exempt to exempt property without giving the unpaid creditors any basis of complaint (13).

§ 30. **Voluntary conveyances.** A very common form of conveyance by debtors, which is attacked by creditors, is the so-called *voluntary* conveyance. By this is understood a transfer of valuable property without receiving compensation therefor, or, in short, as a gift. Conveyances by husband to wife or parent to child, as a gift, with no intention or thought of hindering creditors are common, and whether or not such a conveyance can be successfully attacked by creditors depends upon the circumstances of the case and the jurisdiction where it is made. There is a well known principle of the law of fraudulent conveyances embodied in the language that "A man should be just before he is generous." It has particular application to cases of voluntary conveyances made by debtors.

§ 31. **Same: Conflicting views.** A debtor may make a voluntary conveyance, and as a result leave himself with insufficient property in his possession to meet his honest debts. Such a conveyance as a gift is void and may be successfully set aside. If, however, he should make a voluntary transfer of property and have remaining sufficient property to meet all of his debts, even after the transfer, some jurisdictions hold that the creditors have no basis for an attack on the transaction and others hold that they have. Chancellor Kent of New York, in

(13) First National Bank v. Glass, 79 Fed. 706.

laying down the rule for that state, which is but a type of one class mentioned, said: "If the party be indebted at the time of the voluntary settlement it is presumed to be fraudulent in respect to such debts, and *no circumstance* will permit those debts to be affected by the settlement or repel the legal presumption of fraud" (14). With no motive to defraud, the debtor's act is nevertheless reprehensible in the eyes of the law, contrary to the principle that a man should be just before he is generous, and some courts hold such conveyances bad, entirely irrespective of any actual intent to defraud and of the fact that he had sufficient property remaining to meet all of his just debts at the time of the conveyance.

By far the greater number of states, however, take the opposite view, and hold that where the debtor has sufficient property remaining after making the gift to meet all of his debts—that is, is solvent—the creditors cannot have the conveyance set aside to be applied to pay their claims. In one case a father, owing seven thousand dollars in debts and owning property valued at ninety-one thousand dollars, made a gift to his daughter, on her marriage, of property valued at from six to ten thousand dollars. Ten years later some of the debts were still unpaid, the debtor then having no other property. The court held the deed could not be set aside (15).

§ 32. **Proof of solvency.** In connection with the latter rule, the relation between the amount of property and the amount of claims outstanding would depend largely upon

(14) Reade v. Livingston, 3 Johnson's Ch. (N. Y.) 481.
(15) Warren v. Moody, 122 U. S. 132.

the property that is considered and the claims included in taking the estimate of the debts. Thus, land that is exempted (because it may be voluntarily used to pay debts), notes, accounts, and all forms of assets are to be counted in making up the value of the debtor's property.

On the other hand, besides the ordinary debts which would concededly be considered, demands arising from tort, from breach of promise to marry, from a debtor's obligation as a surety on notes that have not become due and in the payment of which the principal had not made default, from a guarantor's obligation that another will perform a certain contract which was not broken at the time of the conveyance and perhaps never will be, and liabilities on secured claims and others of similar contingent and uncertain character, are to be counted in determining the amount of indebtedness. This rule is apparently adopted because persons having claims of the character enumerated may attack a fraudulent conveyance and have it set aside, they being among the persons whom the law seeks to protect against the frauds of those who are obligated to meet these claims. Inasmuch as persons having such contingent claims have a right to complain of a fraudulent conveyance, their claims are included in the estimate of the amount of indebtedness.

This common law test of insolvency is very different from that laid down by the provisions of the Act (16), and is only to be applied when the trustee in bankruptcy seeks to set aside a fraudulent conveyance. It is much more drastic against the debtor, in that it permits the trus-

(16) Sec. 1a (15).

tee or attacking party to add to the claims deemed provable under the Act many that are not provable, and thus to swell his indebtedness and increase the possibilities of an insolvent condition. Compare §§ 77-78 below.

§ 33. Future creditors may attack fraudulent conveyances. The English Parliament in 1570 passed an act, already referred to, with reference to fraudulent conveyances, and fixed certain penalties for making them or participating in them. It is to this act (17) that the foundation of the laws of fraudulent conveyances is frequently erroneously referred, as it in fact existed even before the passage of this statute. However, it added certain features to the common law rules. Among these is the right it gave persons who were in no sense creditors at the time a fraudulent conveyance was executed to attack such a conveyance. It aimed to protect all creditors and "others," as stated in one part of the statute, and all "persons," as stated in another part.

So it has been settled that if a party makes a conveyance of his property, with the express intent to become indebted to another in the future and to defraud him of his claim by means of this trick, such creditor may defeat the transfer, although he was not a creditor and had not even a claim against the debtor at the time of the transfer. It has also been held, that, if a debtor were indebted to another when he conveyed property as a gift, and then subsequently incurred other debts, which were not paid, the future creditor could set aside the conveyance by merely showing that the debtor owed debts at the time of

(17) 13 Elizabeth, c. 5.

the conveyance. The theory of the decison rests upon a rule that where a voluntary conveyance is fraudulent as to present creditors it is fraudulent as to future creditors (18).

§ 34. How intent to defraud future creditors shown. To prove an actual intent—a state of mind—to defraud future creditors is, of course, difficult to do. As a consequence it may be inferred from the surrounding circumstances. Thus, it has been held that the mere existence of a debt at the time a voluntary conveyance is made, leaving insufficient property to pay it, is sufficient proof to establish the intent to defraud, even though the existing creditor had since been paid (19). And the fact that a debtor immediately entered into a hazardous business is considered strong evidence tending to prove such intent (20) but it is not conclusive proof.

§ 35. General assignments for benefit of creditors. A common device resorted to by a debtor in stringent circumstances is to make a transfer of all his property to another as trustee, in trust to distribute it or its proceeds among all of the creditors. In the absence of statutory prohibition there is no objection to such an assignment. However, such an assignment cannot contain provisions that tend to delay the creditors. Thus, in a case where the deed of assignment provided that the assignee should in his discretion carry on the business for such time as he should think it for the best interests of the creditors and necessary for the purpose of preventing shrinkage or

(18) Freeman v. Pope, 5 Ch. App. 538.
(19) Marston v. Marston, 54 Me. 476.
(20) Hagerman v. Buchanan, 45 N. J. E. 292.

loss, the court held the conveyance was fraudulent, as the deed attempted to leave the question whether the debtor should have further indulgence with him instead of with the creditors, where it belonged (21). Making such a conveyance is an act of bankruptcy under that portion of the Act which prohibits fraudulent conveyances. A general assignment which has no features that are objectionable under the common law is prohibited by another portion of the statute (22), and the act of making such a conveyance subjects the grantor to a bankruptcy proceeding in the Federal courts. This proceeding is not based on the ground that the debtor made a fraudulent conveyance, but on the ground that he made a conveyance prohibited by the Act.

§ 36. **Assignments with preferences.** At common law an assignment wherein a debtor made provisions for paying some creditors a greater proportion of their claim than others was allowable. Preferences are entirely unobjectionable at common law. Such assignments are, however, in most states prohibited by statute, and are, as will be seen below, prohibited under the national bankruptcy law by making a preference an act of bankruptcy. By the law of some states, if a deed of assignment contains a clause providing for a preference to some creditor or creditors, the entire deed is void and of no effect and is treated as a fraudulent conveyance. Other states merely invalidate the clause giving the preference, and permit the creditor whom the debtor sought to prefer to receive

(21) Gardner v. Commercial National Bank, 95 Ill. 298.
(22) Sec. 3a (4).

only his pro rata portion the same as other general creditors.

§ 37. **Preferences.** It has been stated above (§ 28) that a preference is the payment by a debtor of an honest debt, or a portion thereof, to one or more of his creditors without paying a like proportion to other creditors. It was also stated that this may be done at common law. This is not true under the Act (23). Either voluntarily giving, or involuntarily and unavoidably suffering and permitting (24) a preference to be acquired, constitutes an offense under the statute upon which a petition in bankruptcy can be based.

§ 38. **How creditors may force debtor to commit an act of bankruptcy.** It is in connection with the law of preferences that creditors are given a means under the statute of forcing an insolvent debtor, who makes no move otherwise prohibited by the law upon which proceedings against him may be based, to commit an act of bankruptcy. This they accomplish by procuring a judgment against him, levying upon his property, and fixing a day for its sale. If he fails to vacate the levy within five days of the day set for the sale, he will have committed an act of bankruptcy (25). If, on the other hand, he pays the judgment and thus vacates it, being insolvent, he will have paid the judgment creditor in full, whereas no payment has been made to other creditors, and will have violated another part of the law (26). If he does not vacate

(23) Sec. 3a (2) and (3).
(24) Wilson v. Nelson, 183 U. S. 191.
(25) Sec. 3a (3).
(26) Sec. 3a (2).

the lien he will be guilty of an act of bankruptcy, and he will not escape it if he does. Under such circumstances he can only avoid the preferential sections of the law by having a friend advance the money and release the claim for him without diminishing his assets.

§ 39. **Statutory admissions by debtor.** Under the last portion of the section defining acts of bankruptcy (27), that of admitting inability to pay debts and willingness to be adjudged a bankrupt on that ground, natural persons are, of course, included. It was at one time questioned whether a corporation could be adjudged a bankrupt on this ground, it being argued that to permit it would be tantamount to permitting a corporation to become a voluntary bankrupt, which was expressly prohibited by the Act (28). This contention was, however, repudiated, and it is now well settled that a corporation, as well as a natural person, may, by authority of its board of directors, make an admission in writing of its inability to pay its debts and its willingness to be adjudged a bankrupt on that ground, and may thereon be adjudged a bankrupt (29). It is also well settled that insolvency in such a proceeding, as in a proceeding based on the debtor having made a voluntary assignment (30), is immaterial. These are the only portions under which solvency is immaterial. They tend to show that bankruptcy proceedings may take the form of merely distributing estates, a proceeding similar to that of proceedings in courts of probate where es-

(27) Sec. 3a (5).
(28) Sec. 4a.
(29) Re Moench & Sons, 130 Fed. 685.
(30) West Co. v. Lea, 174 U. S. 590.

tates of deceased persons are administered, the only function of such court being to distribute the assets. The bankruptcy court distributes the property, and, in addition to what is done in a probate court, may grant a discharge from the unpaid portion of the debts.

§ 40. **Trial and adjudication: Voluntary cases.** In voluntary bankruptcy cases where the debtor of his own volition petitions the court to be adjudicated a bankrupt, the order of adjudication is entered by the court as a matter of course. No issues are made up to be tried by court or jury. If the applicant is amenable to the law and the court has jurisdiction, no objection can be interposed by creditors or others which would prevent the entry of the order. If the petitioner is insolvent, his election to submit himself voluntarily rather than wait to have his creditors compel him to submit, as they have the power to do, is conclusive. If, on the other hand, he is not insolvent, and desires to discontinue business and to make a distribution of the proceeds of his property among his creditors, any balance remaining after they are paid to be paid to him, he is made his own judge as to the expediency and advisability of applying to the court for assistance in accomplishing this purpose.

§ 41. **Same: Involuntary cases.** In involuntary cases, on the other hand, creditors are endeavoring to coerce an unwilling and reluctant debtor to give up his property for the benefit of his creditors. The basis of their action rests upon some act which the debtor has done which is sufficient to make him amenable to the bankruptcy law, and it carries with it, as do all bankruptcy proceedings, a

slight tinge of disgrace. The debtor, to save his business and property as well as his honor, in many instances defends against the proceeding. His defense is set up by what is known as an answer. The case is then at issue and a hearing before a judge—or a jury, if a special request is made for a jury (31)—is necessary to determine the issue presented by the petition and answer. The following are some of the issues that may be passed upon at such a hearing.

§ 42. **Same: Issues presented for determination.** The debtor, commonly called the respondent, at such a hearing may claim that he is not engaged in a business or occupation of such a character as to make him amenable to the Act, or that he does not owe sufficient debts to entitle the petitioners to proceed against him. He may deny that he committed the act of bankruptcy alleged in the petition. He may assert that the petitioning creditors or some of them have no claim against him; or that their claims, or some of them, are not provable—a prerequisite to entitle them to be petitioning creditors; or that the amount of their claims is insufficient to sustain their action. He may show that he did not have his domicile, residence, or his principal place of business in the territorial jurisdiction of the court for six months, or the greater part thereof, immediately preceding the filing of the petition. If the issue or issues tried are decided for the petitioners, the court enters an order of adjudication; and from that time the bankrupt and his property are to be dealt with in accordance with the provisions of the statute.

(31) Sec. 19.

CHAPTER IV.

TRUSTEE AND PROPERTY.

Section 1. The Trustee.

§ 43. Provisional officer: Receiver. After the filing of a petition, whether voluntary or involuntary, and before an adjudication, or afterwards and before the election of a trustee, the bankruptcy court may appoint, at the instigation of a creditor, a receiver to conserve the property and guard the interests of creditors in the interim between his appointment and the election of a trustee. Were it not for some such provision, placing the property in the custody of the court by its receiver, estates would deteriorate, be wasted, or lost. Such a provisional officer is necessary to bridge the gap between the filing of the petition and the election of a trustee. His duties may extend further than a mere preservation of the property, as where perishable articles are found in the estate, or raw or unfinished materials in the course of manufacture exist at the time he takes possession. It is usual in such cases for the court to authorize him to sell the perishable property, and to continue the business sufficiently long to use up the raw material or to finish up any unfinished article of commerce (1). The receiver is en-

(1) Sec. 2 (5).

titled to compensation for such services which is usually regulated by the compensation given to a trustee.

The receiver is put in possession of the property merely as a temporary officer. In many instances, where the court denies the application of the petitioning creditors and dismisses their petition, the receiver is the only officer who takes possession of the property. If the court refuses the petition, the receiver turns the property back to the alleged bankrupt and the case is ended. In other instances, he merely holds the property until the debtor offers a composition to his creditors, i. e., a certain percentage of all claims outstanding. If this offer of settlement is accepted by the creditors, the property is turned back to the bankrupt.

§ 44. Election and qualification of trustee. The permanent court officer is the trustee. His position is only possible in cases where there has been an adjudication. After the adjudication the creditors hold a meeting and elect a trustee. The persons entitled to vote are those who hold provable claims against the bankrupt (2). The majority in number and amount of creditors is necessary to elect. In case of a failure of the creditors to elect, it becomes the court's duty to appoint a trustee. A creditor, in order to be entitled to participate in the election, must show his qualification by a sworn statement of the nature and amount of his claim. This he does by presenting what is called a proof of claim. This same proof is subsequently made the basis for the payment of dividends. In case the creditor does not desire to or cannot attend personally,

(2) Sec. 44a.

he may authorize any person to act as his attorney by giving to such person a power of attorney. This attorney may do whatever the creditor might if he were present.

Before the trustee enters upon the performance of his duties he is required to qualify for his office by entering into a bond to the United States, with sureties to be approved by the court. The bond is conditioned for the faithful performance of the official duties (3). The creditors fix the amount of the bond, or, in case they fail to do so, the duty devolves upon the court (4).

§ 45. **Duties of trustee: To take possession of property.** After the trustee has been elected and qualified by giving his bond, he is in a position to assume the duties of his office. It devolves upon him as trustee to take entire charge of the bankrupt's property, be its custodian, and care for it until sold. If a receiver has been appointed in the proceeding, who is in charge of the property at the time of the trustee's qualification, he receives possession from him. If not and the bankrupt is still in control of the property, the trustee succeeds to his possession. A discussion of the different kinds of property that the trustee takes appears below (5).

§ 46. **Same: To set apart bankrupt's exemptions.** The laws of the various states provide, either that certain specific property named or else property valued at a given amount shall be protected, at all events, from the claims of creditors. Such laws are known as exemption

(3) Sec. 50b.
(4) Sec. 50c.
(5) See §§ 53-63, below.

laws and the right thus to hold property is known as the right of exemption. The bankruptcy law observes the various state laws on this subject, where they are not in conflict with it (6). Title to exempt property does not pass to the trustee, as will be seen later (§ 64). If he takes possession of it where the statute makes certain specific property exempt, as the homestead, for example, it is his duty to deliver this back to the bankrupt. In states where the bankrupt may claim any property he has, valued at not to exceed a fixed amount, it is the trustee's duty to set apart for the bankrupt the property he chooses to take as his exemption (7).

§ 47. **Same: To bring suit to recover property and assets.** In the course of the administration of a bankrupt estate, it becomes a part of the trustee's work to make investigation into the affairs of the bankrupt to ascertain what property he has concealed; what fraudulent conveyances, preferences, and transfers, void against creditors by the laws of the state, he has made; and what liens were affixed to his property by legal proceedings. A discussion of the time limit required by the Act to make such interests available to the trustee, the nature of the interests, and the sources of the trustee's title to them is given below (8). He is assisted in this undertaking by the court, which has power to compel the bankrupt to testify as to the present and past condition of his affairs, as to his dealings with his creditors and others, and as to the

(6) Sec. 6a.
(7) Sec. 47a (11).
(8) See §§ 67-82.

amount, kind, and whereabouts of his property (9). Other witnesses may also be subpoenaed to testify (10). In case he makes a discovery of interests of the character mentioned, it devolves upon him to institute the proper legal proceedings, or to take whatever steps are necessary to realize on these interests. He is also the officer to collect any outstanding accounts receivable.

§ 48. **Same: To reduce all property to money and pay dividends.** The ultimate object of the entire proceeding for the creditors is to have the money, realized by the trustee from whatever source, distributed pro rata among them as dividends (11). To do this it is necessary for him to sell the property or assets, and to reduce to money any interests he has as trustee (12). This he is obliged to deposit in a bank or depository designated by the court (13), and he must account for all interest received on money deposited (14).

§ 49. **Same: To keep accounts, make reports, and give information.** In addition to the duty of collecting the property and assets, reducing them to money and distributing it among creditors, the trustee is obliged, by the provisions of the Act, to keep accounts showing all money received and from what sources, and all amounts expended and for what purposes (15); to furnish such information concerning the estate as may be required by

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(9) Sec. 47a (9).
(10) Sec. 41a.
(11) Sec. 47a (9).
(12) Sec. 47a (2).
(13) Sec. 47a (3).
(14) Sec. 47a (6).
(15) Sec. 47a (6).

parties in interest (16); to report to the court from time to time the condition of the estate and the amount of money on hand (17); and to make final reports and file final accounts (18).

§ 50. **Compensation of trustee.** The law fixes a scale of charges the trustee may make. It is based on the amount of money disbursed by him. Thus he receives not to exceed six per cent. on the first $500 or less; four per cent. on moneys in excess of $500; two per cent. on moneys in excess of $1500 and less than $10,000; and one per cent. on moneys in excess of $10,000 (19). In small estates the compensation is frequently very small and in no manner commensurate with the work done. In large estates, on the other hand, a very reasonable compensation is provided. One of the serious defects of the Act of 1867 rested in its lax methods of compensating the officers of the court. Too much latitude was allowed the judges in awarding fees to assignees in bankruptcy. This Act has not met with severe criticism on this ground. The opportunities, however, for large fees for attorneys for the trustee still prevail and are at times abused.

Section 2. Title and Property Passing to Trustee from Bankrupt.

§ 51. **In general.** In considering what property passes to the trustee, attention is again directed to the fact that natural persons, no matter in what business engaged nor

(16) Sec. 47a (5).
(17) Sec. 47a (9).
(18) Sec. 47a (8).
(19) Sec. 48a.

what their occupations, may become banprupts; and that all natural persons, except wage earners or those engaged in farming or the tillage of the soil, and many artificial persons may be compelled to be bankrupts. With persons of so many occupations subject to the Act, the character of the property owned and thus involved in bankruptcy becomes as widely diversified as the property interests man cherishes.

As bankruptcy proceedings are for the benefit of the creditors; as they, on the one hand, are primarily interested in having everything owned by the bankrupt, from which value can be realized, pass to the trustee; and as the bankrupt, on the other hand, is desirous of retaining as much of his property as is consonant with reason and the provisions of the law; conflicts have arisen over what property interests pass. Then the question as to when the title passes, whether at the time the petition is filed or at the time of the adjudication, has also arisen. The source of the trustee's title to the interests that pass, whether it is derived from the bankrupt, from the creditors, or from the express provisions of the law has been made of peculiar importance by certain decisions of the courts.

In this Section the interests passing from the bankrupt, and the time at which they pass will be discussed. In the two following Sections rights derived by the trustee from other sources will be considered.

§ 52. **Time and manner of vesting title.** Entirely apart from the kinds of property the trustee takes and the sources of his title is the manner in which title is vested

in him and the time at which it vests. Under the act of 1867 it was necessary for the bankrupt, before the trustee acquired any title, to make a deed of conveyance of his property. Under the present Act the title to all the rights and interests the trustee takes, from whatever source, vests by operation of law (20) without any transfer by deed or other instrument, just as an heir at law takes title to lands of his ancestor. The title vests in him at the time of his appointment and qualification, but reverts and dates back to the time of the adjudication. The quantum of property is determined and delimited by the date of the petition, and if, between that time and the adjudication, there has been an increase of such property, he takes the increment as a portion of the estate (21). But any property the bankrupt acquired after the filing of the petition, entirely independent of what he had before, belongs to him. Thus, property earned by him after that time cannot be taken by the trustee. But property given to him by the will of one who died at 8:45 A. M. when the petition was not filed until 2:30 P. M. of the same day passes to the trustee (22). The line of cleavage between what property belongs to the bankrupt and what to the trustee is fixed by the date of filing the petition. Between this time and the time the title is vested in the trustee it remains in the bankrupt, and is thus in danger of being transferred by him, or of being wasted or lost. It is to prevent such transfer or loss during the interim

(20) Sec. 70a.
(21) In re Pearl, 4 Am. B. R. 578.
(22) Re McKenna, 137 Fed. 611.

that a receiver is put in possession of it as stated in § 43, above.

§ 53. Documents. Section 70a is the important section of the Act defining the different interests that pass to the trustee. The first subdivision of this section provides that the trustee shall be vested with the title of the bankrupt to all documents relating to his property. The act defines "document" as any book, deed, or instrument in writing (23). The trustee is, therefore, vested by operation of law not merely with the right to inspect the bankrupt's books, but with their title. He also takes any and all deeds, promissory notes, bills of exchange, bonds, securities, checks, contracts, bank books, and all papers relating to his business (24).

§ 54. Patents, patent-rights, copyrights, and trademarks. The trustee is vested with the title of all patents, patent rights, copyrights, and trademarks the bankrupt owned at the time the petition was filed (25). This does not entitle the trustee to the right to have mere applications for patents on which no patent right has yet been issued. The applicant has no interest which can be called a patent right before its issuance, although he may have the title to an invention which in his belief is patentable (26).

§ 55. Powers. The statute says the trustee shall be vested with all the powers which the bankrupt might have exercised for his own benefit, but not those which

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(23) Sec. 1a (13).
(24) In re Hess, 136 Fed. 988.
(25) Sec. 70a (2).
(26) In re Dann, 129 Fed. 495.

he might have exercised for some other person (27). No decison has defined what is meant by a power as used in the Act. The courts have said that it did not mean a power to realize on a liquor license (28), and that a husband's right in his wife's real estate is not a power (29). The powers recognized by the common law of which creditors could avail themselves were those that debtors might have exercised in their own favor by charging certain lands with liens, but which they exercised in favor of another without receiving any compensation. The property affected by a power exercised for the purpose of making a gift could be taken by creditors as a voluntary conveyance to defraud them (30). If, however, the person entitled to exercise the power had never done so, creditors had no way to compel him to exercise it so that they could acquire the property affected by the exercise (31). It would seem, however, that by virtue of this provision of the Act, giving to the trustee all powers which the bankrupt could exercise for his own benefit, the bankrupt could be compelled to exercise the power in favor of the trustee.

§ 56. **Fraudulent conveyances.** The act says that the trustee shall be vested with the title of the bankrupt to all property transferred by him in fraud of creditors (32). As stated in the discussion on fraudulent conveyances (§§ 62, 67-68, below), the bankrupt has no title to property he has conveyed in fraud of creditors as between himself

(27) Sec. 70a (3).
(28) Fisher v. Cushman, 103 Fed. 860, 867.
(29) Hesseltine v. Prince, 95 Fed. 802.
(30) Gilman v. Bell, 99 Ill. 144.
(31) Holmes v. Coghill, 7 Vesey, 498.
(32) Sec. 70a (4).

and his transferee. As to creditors, however, the title can be reacquired and sold to pay their claims. It is the title of the creditors, their right to revest the title in the bankrupt for the purpose of paying debts merely, that the trustee takes. A completer discussion of the source of the trustee's title to property fraudulently transferred is given below (§§ 62, 67-68).

§ 57. **Transferable and leviable property.** By far the most comprehensive part of section 70a, the principal section defining what property the trustee takes, is the portion which gives to him the title to all the bankrupt's transferable and leviable property (33); the Act says, "property which prior to the filing of the petition (the bankrupt) could by any means have transferred or which might have been levied upon and sold under judicial process against him." This includes almost everything which the bankrupt actually owned and from which the trustee could realize value for the benefit of the creditors. It is also thought to include property which he has made the subject of a transfer, voidable as against some persons, but which he no longer owned. As creditors may disregard a transfer made to defraud them, and, in law, consider the bankrupt as the owner, levy on such property, and sell it for their benefit, fraudulent conveyances are also thought to pass to the trustee by virtue of this provision. Although such property is no longer transferable by the bankrupt, it may be levied on and sold by creditors under judicial process against him, but it was not the bankrupt's property at the time of the filing of

(33) Sec. 70a (5).

the petition and section 70a does not purport to give the trustee anything except what the bankrupt owned or to which he had title. The real source of the trustee's title to fraudulent conveyances will be more fully discussed later (§§ 67-68).

§ 58. **Same: Illustrations.** Under this provision all tangible property, whether real or personal, of which the bankrupt is in possession at the time of the filing of the petition, and also all that is in possession of another as trustee (34) or bailee for the bankrupt, whether scheduled or not, passes to the trustee in bankruptcy. The husband's marital interest in his wife's land, consisting of his right to use and enjoy it during their joint lives, regardless of the birth of issue, passes to the trustee (35). A dower interest of one spouse (dower being substituted for curtesy by the statutes of some states) in lands of the other, who is dead, passes to the trustee; but the interest of either spouse before the other's death, being a mere possibility dependent upon whether the bankrupt spouse outlives the other, does not pass (36). From the foregoing illustrations it follows that lands the bankrupt has leased to another and from which he is collecting rent, and also lands which he holds under a lease from another, become the trustee's property. In the latter instance, the trustee may find the rent all paid, and, if not paid, past due, so that the landlord holds a provable claim. In either case he would be entitled to the lease as an asset free from any obligation to pay rent.

(34) In re Jersey Packing Co., 138 Fed. 625, 627.
(35) In re Marquette, 103 Fed. 777 (stating common law rule).
(36) In re Russell, 13 A. B. R. 24.

Where, however, the rent has neither been paid nor matured into a provable claim and its payment would be a burden upon the estate, he may elect to abandon his interest in the leased property (37), whereupon it again becomes the property of the bankrupt, who may be made to pay the rent coming due after bankruptcy and to perform the contract of lease, although he has procured a discharge. See § 96, below. All such interests in land pass, because they are transferable by the bankrupt or because they might have been levied upon and sold under judicial process against him.

§ 59. **Choses in action.** It was stated above (§ 53) that the trustee was vested with the title to all promissory notes, bills of exchange, bonds, securities, checks, contracts, and bank books. He is not merely vested with the title to the document, but with the beneficial interest to be derived from its enforcement. He may realize upon all stocks, bonds, commercial paper, mortgages, and accounts collectible, including bank accounts. He also takes all merchandise and stock in trade. The foregoing are clear instances of property that passes under the transferable and leviable provision, there being little question but that the interests are transferable by the bankrupt. It has been held that a bankrupt's seat in a stock exchange passes, although by the rules of the exchange the purchaser may be refused membership. The bankrupt has the power to surrender his interest in his membership to another, the latter taking it subject to the risk of procuring his election by the exchange. The courts take the

(37) Watson v. Merrill, 136 Fed. 359.

view that this membership, having value and being capable of transfer by some means, belongs to the trustee (38). Another peculiar interest that the courts have held to be transferable by some means is the interest of the holder of a license to sell liquor, even though the transferee of such a privilege may be required to procure the assent of some official body before being entitled to exercise it (39).

§ 60. **Life insurance policies.** By the laws of many states life insurance policies are exempt from creditors, and under the Act this exemption is preserved to the bankrupt (40). In such policies exempt by state law, the trustee takes no interest. Furthermore he takes no interest in policies taken out on the life of the bankrupt, payable absolutely to another or assigned to another (41). Policies of life insurance may be made payable in all events to the bankrupt or his estate. Such policies, if they have value, pass to the trustee. They may be made payable to a third person, as wife, child, or relative; and, if such third person die before the insured, then to be payable to the latter's estate. If either the insured or the beneficiary becomes bankrupt, the trustee takes his interest (42). Likewise, if the policy is payable absolutely to a third person and he becomes bankrupt, the trustee takes the interest (43). Similarly, where a policy is made payable to the insured at the end of a fixed period

(38) Page v. Edmunds, 187 U. S. 596.
(39) In re Becker, 98 Fed. 407.
(40) Sec. 6a; Holden v. Stratton, 198 U. S. 202.
(41) In re Steele, 98 Fed. 78.
(42) In re Welling, 113 Fed. 189.
(43) In re Steele, 98 Fed. 78.

of time, but, if insured should die before that time, then to some third person, the trustee takes the interest of the insured (44). It passes, of course, subject to the rights of the third person. Should the third person become bankrupt, his trustee would be entitled to his interest in the policy. But in such a case, where the insured has designated some third person beneficiary but has reserved the right to change the beneficiary at any time, he being capable at the time the petition was filed of transferring the beneficial interest to himself, the trustee takes the policy free from the interest of the beneficiary (45).

The interests in life insurance policies always pass, even in the states that do not make them exempt, subject to the right of the insured bankrupt to pay the trustee the surrender value, if the policy has such a value, and thus redeem it from the creditors. This he is obligated to do within thirty days after the insurance company has stated to the trustee its cash surrender value (46). In states where such policies are exempt, such redemption is, of course, not necessary.

§ 61. Rights of action. The Act says that the trustee shall be vested with the title of the bankrupt to all rights of action arising upon contracts, or from the unlawful taking or detention of, or injury to, his property (47). As stated above (§ 59), the right to bring suit on commercial

(44) In re Boardman, 103 Fed. 783.

(45) Foxhever v. Order of Red Cross, 24 Ohio Circuit, 56 (not a bankruptcy case).

(46) Sec. 70a (5).

(47) Sec. 70a (6).

paper, bonds, and open accounts passes to the trustee. This portion of the Act gives the trustee the right to sue upon contracts between the bankrupt and third persons when broken by the latter, by virtue of which breaches the bankrupt is entitled to damages. An instance arose where a coal mining company contracted to deliver to the bankrupt 5,000 tons of coal per month for a year. After deliveries became due, the company refused to carry out the contract, and the petition was filed after the time of the performance of the contract had expired. In such a case the trustee may sue the company for the damages. The sum to be recovered in such a case is not the fixed sum usual in cases of notes, bonds, or accounts, but consists of an unliquidated sum to be fixed by a jury or court, the amount depending upon general market conditions at the time the contract should have been performed. It has also been held that the trustee is vested with the right to sue for usurious interest. This was upon the ground, however, that the bankrupt could have transferred the right to sue to another by the law of the state where the usurious contract was made (48). It thus passed to the trustee rather under the leviable and transferable portion of section 70a than under this portion of it. An instance where a trustee was permitted to sue for injury to the bankrupt's property is given in a decision (49) where he maintained an action against the bankrupt's landlord for negligently allowing water to do injury to the premises the bankrupt had leased from him. The

(48) First National Bank v. Lasater, 196 U. S. 115.
(49) In re Becher Bros., 139 Fed. 366.

damages the bankrupt could have recovered had the bankruptcy not intervened, the trustee has the right to recover.

§ 62. **Source of trustee's title.** The trustee, by the express language of the Act, is vested with the *bankrupt's* title to all the interests so far discussed, which he takes under this section of the Act. This section (50) may even be construed to give to the trustee the bankrupt's title to property conveyed in fraud of creditors, as intimated in § 57, above. If the bankrupt had title to such property, no difficulty could be experienced. It seems the better view would be that section 70a purported to pass to the trustee only property the title to which was in the bank rupt at the time of the filing of the petition. This would appear to be the intent gathered from a reading of the entire section. It will be fully shown below (§§ 67-68) that it is not necessary to trace the trustee's title to fraudulent conveyances to the bankrupt as a source, but that the trustee's real source of title to such property, and to property that is the subject of a transfer void by the law of the state for failure to comply with its recording laws, is the bankrupt's creditors. As to any other property vested in the trustee by this section, he derives his title from the bankrupt. He takes it by reason of the fact that the bankrupt had it as his own, and asserted or could assert a beneficial interest in it, whether in his possession or not, or whether the title was in him or another for him. Such an actual title is clearly distinguishable from the entire absence of title in the bankrupt occurring in fraudulent conveyances. In such convey-

(50) Sec. 70a.

ances he neither has an actual title, nor is he in a position to assert any interest in them. Because of the entire absence in the bankrupt of any title or interest, it would seem this section could not be relied upon to transfer to the trustee any title to fraudulent conveyances, as it in terms only conveys the bankrupt's title.

§ 63. Property passes to trustee just as bankrupt held it. The general rule is that the trustee takes whatever interest the bankrupt had. Thus, if the latter's land is subject to a mortgage, a vender's lien, or a tax or mechanic's lien, the trustee takes it subject to that incumbrance. Furthermore, if the husband, seized of real estate, becomes bankrupt, the trustee takes the land subject to the right of the wife to have dower in case the husband dies before she does (51); and, similarly, the husband keeps his right to curtesy in the land of the wife, when she becomes bankrupt and dies before he does. The rule is the same with reference to personal property. Thus, if a bankrupt makes his promissory note for five thousand dollars and delivers to the payee chattels in pledge to secure its payment, the trustee takes the chattels subject to the right of the pledgee to retain possession until the note has been paid (52), or to sell the chattels to make the amount thereof from the proceeds. If the proceeds realized on a sale of the property pledged exceed his claim, the trustee is entitled to the excess. The general principle is well illustrated by a case where the bankrupt had purchased property at an execution sale.

(51) In re McKenzie, 142 Fed. 383.
(52) Yeatman v. Savings' Institution, 95 U. S. 764.

By the state law, sales on execution were subject to redemption for a fixed period after the sale, by the party whose property was sold or by the creditors who had an unsatisfied execution against him. The court held that the trustee of the execution purchaser took the property, subject to the right of an execution creditor of the debtor whose property was involved to redeem from the sale (53).

The rule here stated is, however, subject to the limitation hereafter to be discussed, that the trustee, in certain kinds of conveyances fraudulent as to creditors at common law or under the Act, does not take subject to the lien of the transferees, and in such instances he does not take the property in the plight in which it was found at the time of the bankruptcy.

From the preceding illustrations it appears that the trustee takes any title or interest, which he derives directly from the bankrupt, subject to any valid incumbrance, charge, or equity the latter has placed upon it, and holds it in the same plight and condition in which it was held by the bankrupt.

§ 64. **Property not passing to trustee: Exemptions and expectancies.** The most uniform exception to the rule that all property owned by the bankrupt passes to the trustee is that of property that is exempt (54). Again, mere expectancies do not pass to the trustee. Thus, a bankrupt's son, who expects to be the heir of a parent owning valuable property, does not have any interest in his parent's property other than a possibility that when the

(53) Pease v. Richie, 132 Ill. 647.
(54) Lockwood v. Exchange Bank, 190 U. S. 294.

parent dies he will get a part of it (55). But such interest does not pass to the trustee. A bankrupt woman's chance of getting dower in her living husband's lands, in case she outlives him, does not pass. There is only a bare possibility that she will ever get anything; she takes an interest only in case she outlives the husband. Interests of such a contingent character do not pass (56).

§ 65. **Same: Trust property.** Property held in trust by the bankrupt for another, in which he has no beneficial interest, does not pass. Thus, a party bought property and transferred the title to another, he agreeing to hold it in trust for the purchaser's grandchildren. The transferee became bankrupt. For failure to reduce this agreement to writing the trust could not be enforced in favor of the grandchildren, and the trustee in bankruptcy claimed the property. The court held that he could not take it, as it was held in trust for the purchaser upon a failure of the trust in favor of the grandchildren (57).

§ 66. **Same: After-acquired property.** Property acquired by the bankrupt after filing a petition and before an adjudication belongs to the bankrupt, free from the claims of creditors existing when the petition was filed. So, property given to the bankrupt or inherited by him after the petition was filed, but before the adjudication, does not go to swell the assets of the trustee. And, again, property bought by him on credit after the proceedings are instituted does not pass to the trustee (58). It is not

(55) Moth v. Frome, 1 Amb. 394.
(56) In re Russell, 13 A. B. R. 24.
(57) In re Davis, 7 A. B. R. 258.
(58) In re Burka, 104 Fed. 326 (by way of argument).

property which he could by any means have transferred before the filing of the petition, nor is it such property as could have been taken at that time by any judicial process against him. Furthermore, the claim arising from such a purchase, having no existence at the time the petition was filed, is not provable, nor is it affected by the bankrupt's subsequent discharge; only claims that are provable being dischargeable, as will be seen in Chapter VI, below.

SECTION 3. RIGHTS OF CREDITORS PASSING TO TRUSTEE.

§ 67. **In general.** The trustee becomes vested not only with the property the bankrupt had title to at the time the petition was filed, but he takes additional interests. Sec. 70a (4) purports to give to the trustee title to property the bankrupt had conveyed in fraud of creditors, and sec. 70a (5) to give him the property of the bankrupt which might have been taken under judicial process issued against him. These provisions standing alone would give the trustee no interest in property conveyed by the bankrupt in fraud of creditors, for the bankrupt retains no interest in such property. A debtor by making such a conveyance divests himself of all title, and, as between him and the transferee, the bankrupt's title is withdrawn as effectually as if the conveyance had been made in absolute good faith. If the trustee, therefore, were limited to the *bankrupt's right* in such property and he sought to reclaim it by virtue of sec. 70a (4) and (5) he would get nothing.

§ 68. **Conveyances in fraud of creditors.** The Act is sufficiently extensive, however, to vest in him this right.

He not only acquires the right to set aside fraudulent conveyances made within four months before bankruptcy proceedings were instituted (59), but even those made at a more remote period, provided only that the right to set them aside is not barred by the statute of limitations (60) of the state where the transfers were made. The fact that the debtor has no title or interest in such property does not in any way affect the title and interest of the trustee therein. In the absence of bankruptcy proceedings, creditors may levy upon such property in the hands of the fraudulent transferee, and sell it to satisfy their claims. If it cannot be advantageously sold because of the cloud on the title caused by the fraudulent instrument of conveyance, they may apply to a court of equity to remove such cloud (61). It is to the *creditors' rights* in fraudulent conveyances that the trustee succeeds (62), as well as to any title of the bankrupt. If this were not so, creditors would be prejudiced by bankruptcy proceedings rather than benefited (the latter being the object of the Act), because their hands would be tied by being subject to injunction against bringing or continuing suits after bankruptcy, until a discharge has been granted, and thereafter subject to the plea of a discharge (63). If it can be shown by the trustee that the bankrupt gave away certain property, or made any other conveyance recognized as fraudulent against creditors by the state

(59) Sec. 67e.
(60) Sec. 70e.
(61) Lumber Co. v. Thierault, 107 Wis. 627.
(62) Bush v. Export Storage Co., 136 Fed. 918.
(63) Sec. 11a.

law (64), he acquires through the creditors the right to set aside such conveyances and to make the property conveyed a part of the assets of the estate.

§ 69. Purchasers of property conveyed in fraud of creditors. The trustee is limited in his right to set aside fraudulent conveyances, very much as he is limited in the interest he takes by virtue of the title held by the bankrupt. It was seen above (§ 63) that the trustee takes the bankrupt's title to property, subject to any outstanding incumbrances, charges, or equities placed on it by the bankrupt. The first limitation is provided for in the Act, where it says that the trustee cannot set aside fraudulent conveyances as against those who have purchased the property from the transferee without notice or knowledge of the fraud (65). The second limitation is a result of judicial decision. The United States Supreme Court has laid down the doctrine that the trustee cannot reclaim a fraudulent conveyance, unless some creditor had, before the filing of the petition, actually seized the property which was the subject of the conveyance; and other courts have held that it may be done then only to the extent of the judgment sought to be satisfied by the seizure. The discussion of the doctrine of this case appears below (§§ 73-74).

§ 70. Conveyances and liens not fraudulent but void as to creditors. By the laws of many states conveyances of property by a party, whether absolutely or merely by the creation of a lien as a security for a loan, are void as to

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(64) See §§ 21-31, above.
(65) Secs. 67e and 70e.

creditors, unless the instrument of conveyance has been recorded or the transferee has taken possession under it. Some statutes make such conveyances void as against creditors generally, interpreting the word "creditors" to mean, however, only those who seize upon the property by attachment or execution or acquire a lien by judgment, before the instrument is recorded or possession taken under it. Others make them void merely as to subsequent creditors. The Act provides that all conveyances of property, void as against the creditors by the laws of the state where situated, shall be void against them if the transferor is adjudicated a bankrupt (66). It also says that claims, which, for want of record, would not be valid liens as against the claims of creditors of the bankrupt, shall not be liens against his estate (67).

§ 71. Same: Illustrations. If a debtor convey land to another, and the latter fails to have the instrument of conveyance recorded or to take possession of the land, a judgment, attachment, or execution creditor may take the land to satisfy his claim, even against the transferee (68). Similarly, where a contractual vendor of chattels sells them to another, retaining title in himself until paid for by the vendee, if the state law requires such a contract to be recorded in order to protect the contractual vendor against the claims of the vendee's creditors, a failure to record subjects such property to the claims of the vendee's attachment or execution creditors. Sales under con-

(66) Sec. 67e.
(67) Sec. 67a.
(68) First National Bank v. Staake, 202 U. S. 141.

tracts of this character are known as "conditional sales." See Sales in Volume III of this work. If a chattel mortgage is made and not recorded, where record is required to prevent the property being taken by creditors of the mortgagor, attachment and execution creditors may defeat the interest of the mortgagee.

§ 72. **Same: Effect of act.** It is this right which judgment, attachment, or execution creditors have by the laws of some states to take property that has been the subject of such an unrecorded conveyance, or a conveyance under which the transferee has not taken possession, to which the trustee in bankruptcy succeeds; and he succeeds to it, not as a successor of the bankrupt, but as the successor of his creditors. The right is subject, however, as was the right to set aside fraudulent conveyances, to the limitation that, if the state law requires a judgment, attachment, or execution lien to defeat the interest of the transferee, the trustee cannot defeat such interest unless such a lien claimant existed when the petition was filed. The trustee, then, takes the rights that creditors had, if bankruptcy had not intervened, to realize upon conveyances fraudulent as to creditors at common law or under the statute of Elizabeth, conveyances void as to creditors for want of record, and also void for any other reason by the law of the state where made.

§ 73. **York Manufacturing Co. v. Cassell.** A leading case on the subject as to when a trustee is in a position to attack such unrecorded conveyances, and, on principle, even a conveyance in fraud of creditors, is that of York Manufacturing Co. v. Cassel (69). A vendor of machinery

(69) 201 U. S. 344.

sold it to a party under a contract of conditional sale, wherein the vendor retained the right to remove and take back the property at the expiration of a fixed time, if it was not paid for. Such contracts by the law of the state (Ohio) were void as to creditors if not recorded. The vendee became bankrupt, before any creditor had levied on the machinery or put himself in a position to assert a lien against it. The trustee contended that the vendor could not hold the machinery against him, because the contract was void, not being recorded as required by law. The court held that, as no creditor had put himself in a position to avoid the transfer before bankruptcy intervened—had not, as it is said "armed himself with process" —the trustee could assert only the interest of the bankrupt, which was subject to the right of the vendor to remove the machinery.

§ 74. **Same: Results of this decision.** Applying the principles the Supreme Court laid down in this case, it would seem necessary that creditors take all the steps essential to setting aside a fraudulent conveyance before bankruptcy intervened, in order to clothe the trustee with any right or power to do so. A deplorable consequence of this doctrine is to be noted. If no creditor, at the time bankruptcy proceedings begin, has procured a judgment against the debtor, had execution issued and returned unsatisfied (the ordinary prerequisite to be entitled to set aside a fraudulent conveyance), then the trustee cannot procure for creditors the advantage of setting aside a fraudulent conveyance. The creditors are prevented from bringing

such suit, as the bankrupt may enjoin them (70). The result is that property which is the subject of a fraudulent conveyance is lost to creditors, merely because bankruptcy intervened. This result would seem contrary to the general spirit of the Act.

In a similar way, if some creditor has not procured a judgment, attachment, or execution lien upon property conveyed without recording where it is required, creditors cannot increase the assets in the trustee's hands by the property in that condition; whereas, if bankruptcy had not intervened, they could take it to satisfy their claims. To add to what would seem a sufficiently deplorable result, the courts have followed the logic of the doctrine to its limit, and have held that even where such a creditor had obtained a lien, only such part of the property can be taken by the trustee as will satisfy the claim on which the lien was procured (71).

Section 4. Rights of Trustee Created by Law.

§ 75. Preferential transfers and legal liens. The trustee is vested with certain rights, which he neither derives as a direct successor to the bankrupt's interest, nor as a successor to the rights creditors are vested with in the absence of proceedings in bankruptcy. He is vested with these rights as a direct and immediate result of the law itself. The rights referred to are those of taking the property which was (a) the subject of a preferential transfer or payment (72), and (b) the subject of a lien

(70) Sec. 11.
(71) In re Economical Printing Co., 110 Fed. 514.
(72) Sec. 60b.

acquired through legal proceedings (73). A preference given by the voluntary act of the debtor or permitted by him was considered an innocent and harmless act at common law. To prevent the injustice resulting from such a practice is one of the chief objects of modern bankruptcy legislation. As the common law recognized no right in creditors to interfere with preferential transfers, the bankruptcy codes provide a new title for the trustee in order to make the prohibition against giving preferences effectual. Property subjected to liens, acquired by legal proceedings within four months of filing the petition, is also freed from such liens by the operation of the bankruptcy law. Were this not the case the effect of prohibiting voluntary preferences would be lost, as eager creditors would invariably resort to the indirect method of getting what is in fact a preference, though not so called by the law, through the lien acquired in legal proceedings. In this connection it must be noted that liens acquired by legal proceedings may be dissolved in one of two ways: (1) If the lien claimant acquired his lien, or the proceeds resulting from a sale of the property affected by it, with knowledge of the debtor's insolvency or reasonable cause to believe him so, it can be dissolved as a preference. (2) But even in a case where the claimant had no such knowledge or cause to believe the debtor was insolvent, the lien may still be dissolved, if it was acquired while the debtor was insolvent, without any further proof.

§ 76. Fundamental features of preferences. In order that the bankruptcy law may be applied to property which

(73) Sec. 67, c and f.

it is asserted has been the subject of a preferential transfer, several things must concur. A conveyance of property or the payment of money must have been made, the result of which was a *depletion of the debtor's estate* and a giving to the preferred creditor an undue proportion of the property. It has been held that where a debtor gives a mortgage on certain property to secure the payment of a pre-existing debt, in exchange for the release of a mortgage on other property, no preference can be established, as there has been a mere exchange of values with no reduction in the amount of the debtor's assets (74). By implication, then, there must be some loss to the creditors generally, a lessening of the assets to pay debts.

The claim to satisfy or secure which the conveyance or payment is made must have been a *pre-existing* claim. For instance, to pay for property delivered or work done, concurrently with the receipt of the property or the doing of the work, is not giving a preference. A fair exchange of values can injure no one and is not a preference. And the payment of rent in advance is not giving a preference, as the right to occupy the premises is a valuable asset substituted for the conveyance (75). While these instances are explicable on the ground that there is an exchange of values, the further element of a pre-existing debt is wanting, and they are therefore not preferences for that reason.

If the obligation paid or secured by the debtor is not a

(74) Sawyer v. Turpin, 91 U. S. 114.
(75) In re Lange, 97 Fed. 197.

provable claim, the nature of which will be examined in Chapter V, below, no preference arises. Thus, to pay a claim due another for a personal injury inflicted upon him is not giving a preference (76). Similarly, the payment of a claim for libeling or slandering another would not create a preference.

Furthermore, the debtor must have been *insolvent,* i. e., had less than sufficient property at a fair valuation to pay his debts when he made the alleged preferential transfer; the conveyance must have been made within *four months* of the date of filing the petition; and the creditor preferred must have *known or had reasonable cause to believe* the debtor intended to prefer him (77). Unless these facts are shown a trustee will have failed to establish a preferential transfer.

§ 77. Insolvency. Under the general state insolvency and bankruptcy laws, as under the prior Federal acts, the term "insolvency" meant an inability of the debtor to pay his debts as they became due, entirely regardless of the relation between the value of his property and the amount of his debts. In times of financial stringency even the wealthiest and most prosperous business men would be insolvent with such a test applied; the majority of business men must have found themselves insolvent at some time or other during the financial panics of 1893 and of 1907, had they been subjected to such a test of insolvency. It was this test of insolvency which was one of the grounds of attack upon the law of 1867 and which ultimately caused its repeal.

(76) In re Yates, 114 Fed. 365.
(77) Sec. 60, a and b.

Under the present Act a person shall be deemed insolvent, whenever the aggregate of his property, exclusive of any that has been made the subject of a fraudulent conveyance, shall not, at a fair valuation, be sufficient in amount to pay his debts (78). In this connection it is worthy of note that this definition of insolvency differs also from that applied at common law, independent of insolvency or bankruptcy acts, in that it confines the courts, in making an estimate of the liabilities, to *debts,* which are none other under the Act than provable claims (79), while the common law test permitted them to add to the claims that are known as debts, many that were not recognized as such (§ 32, above). What claims are provable, will be treated in Chapter V, below. Suffice it to say at this place that contingent claims that can be counted at common law, and claims for torts, where the wrong cannot be waived and the claims presented as on contract, are not counted; but only such as are strictly provable claims under the Act. Such claims are not included because they are not provable (80), but, at common law they were included.

§ 78. **Property included and ascertainment of value.** From the express provision of the Act, the debtor is not to have the advantage of adding property he has fraudulently concealed or conveyed in order to maintain his solvency. This does not, however, exclude from the estimate of the amount of his property any that he has conveyed as a preference. By express decision of the courts

(78) Sec. 1a (15).
(79) Sec. 1a (11).
(80) Goding v. Roscenthal, 180 Mass. 43; In re Yates, 114 Fed. 365.

he may include property that is exempt (81), although in the end such property may not be taken by creditors to satisfy their claims. The Act makes no reference to exempt property when defining insolvency, and, because it may be voluntarily used to pay debts, it is to be included in determining solvency.

In ascertaining the value of the property the Act says its fair value is to be taken, and under ordinary circumstances this would mean the market value. In the case of a going concern, its value is as it existed at the time a preference was made or lien acquired by legal proceedings, and not its value as ascertained by a forced sale under an execution, or even after a levy was made, which would have a tendency to destroy its value (82).

§ 79. Debtor's intent to prefer. It was stated above (§ 76) that an essential element in establishing a preference was the necessity of showing that the party receiving the alleged preference knew or had reasonable cause to believe it was intended by the debtor to give a preference (83). The question naturally arises, whether it is necessary for the trustee in an action to avoid a preference to show that the debtor had the actual intent to prefer, or whether it is sufficient merely to show that the claimant had *reasonable cause to believe* it was intended to give a preference. In a well considered case (84), where the trial judge instructed the jury that the trustee was bound to show the debtor's intent, the reviewing court re-

(81) In re Hines, 144 Fed. 142.
(82) Chicago Title & Trust Co. v. Roebling's Sons Co., 170 Fed. 71.
(83) Sec. 60 (b).
(84) Benedict v. Deshel, 177 N. Y. 1.

versed the decision of the trial court on the ground that the instruction was erroneous. Thus has been established a strong precedent for the view that the debtor's intent is immaterial, and such a view would seem to be correct from the plain language of the Act.

§ 80. **Liens resulting from legal proceedings.** Liens that follow the recovery of a judgment against a debtor are in strictness preferences (85) entered of record within four months of bankruptcy when the debtor is insolvent; but, unless this acquisition was accompanied by the mental attitude of the claimant found to be requisite to set aside a preference, the property cannot be reached by the trustee on that theory. This kind of a lien acquired by legal proceedings does not cover all classes of liens, and it is the property covered by liens acquired by legal proceedings that are not strictly preferences, that the trustee takes under this head. To illustrate, a creditor acquires a judgment more than four months before the filing of the petition, and procures an execution lien on chattels, or an equitable lien resulting from a creditor's bill within four months before bankruptcy; the property covered by such lien is not preferentially transferred, yet it is dissolved and the property passes to the trustee from the claimant (86). Insolvency at the time the lien attached is requisite as in case of preferences, but knowledge of the debtor's insolvency, or reasonable cause to believe him insolvent, is not essential as it was in the case of preferences.

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(85) Sec. 60a.
(86) Sec. 67b.

§ 81. Same: Additional illustrations. The same rule is applicable to attachments made upon property before procuring judgment. Such a lien is also dissolved by bankruptcy (87). If a judgment creditor procures a judgment lien on the debtor's land, such lien will be nullified (88). Even a lien acquired by a garnishment proceeding, wherein property or money of the debtor in the hands of third parties is subjected to a lien, is dissolved (89). The Act is effective in nullifying the lien acquired by almost all receivership proceedings and by ordinary creditors' bills (90).

§ 82. Liens not resulting from legal proceedings. Not all liens acquired within four months, while the debtor is insolvent, can be dissolved by the trustee; either on the theory of preferences or on a theory of liens acquired by legal proceedings. Some of the liens that are not affected, as shown by decided cases, are a sub-contractor's lien (91), a livery-man's lien (92), a landlord's lien for rent (93), a material man's lien (94), and an artisan's lien (95). Other similar liens which should not be affected for the same reason are innkeepers' liens, carriers' liens, and warehousemen's liens. These liens, not being acquired

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(87) Bear v. Chose, 90 Fed. 920.

(88) In re Tupper, 163 Fed. 766 (by inference).

(89) Klipstein v. Allen Miles Co., 136 Fed. 385, 389-90 (semble). Contra: London Guaranty and Accident Co. v. Mossness, 108 Ill. App. 440.

(90) Metcalf v. Barker, 187 U. S. 165.

(91) In re Emslie, 102 Fed. 291.

(92) In re Mero, 128 Fed. 630 (semble).

(93) In re Mitchell, 116 Fed. 87, 98 (semble).

(94) In re Emslie, 102 Fed. 291.

(95) In re Lowensohn, 4 A. B. R. 79 (work done on garments by tailor for manufacturer).

by legal proceedings, but by a possession of the property or by notice and recording of claims as acquired by statute, they are not affected by bankruptcy proceedings; and the trustee cannot take the property free from such liens, as he can property to which liens have become attached by virtue of legal proceedings. As seen from the general nature of these liens, they are of such a character that as a rule the consideration, to secure which the lien is given, is advanced simultaneously with the acquisition of the lien, or practically so. They are thus exempt from the field of preferences, because there was a transfer for a present debt.

CHAPTER V.

PROVABLE CLAIMS.

§ 83. **Historical basis of provability.** As stated at the outset, historically only traders and merchants could become bankrupts, and the early laws were passed for the protection and better security of these classes as against their debtors. The claims that were most commonly involved and presented for allowance against a bankrupt must have been those of the merchant and trading classes, consisting of fixed liabilities based on contracts or written documents, and the statement is ventured that instances were rare when claims arising from some injury or wrong not based upon contract were presented.

§ 84. **Importance of subject.** The subject of provable claims is of importance in three aspects: (a) If a party has a provable claim he may join in a petition to have a debtor adjudicated a bankrupt Mention of this fact was made in connection with the subject of who may be petitioning creditors, and it was there stated that only those having provable claims could join in a petition (§ 16, above). (b) The party having a provable claim may also cast a vote for a trustee in bankruptcy, as stated in connection with that subject (§ 44, above). (c) The purpose and object of giving to a claimant the two preceding rights, founded on the fact that he has a provable claim,

is to give him a better protection of his claim, to give him a power, which, if exercised, will result in procuring the only thing for which the rights are given—a dividend from a fund realized by sale of the assets. So the third important aspect of a provable claim is to allow participation in the proceeds of the estate.

§ 85. **When claims must exist to be provable.** Every bankruptcy law fixes some point of time separating claims into those that are provable and those that are not—those that may participate in the administration of the estate and in its fruits, and those that may not. The present law has fixed the date of filing the petition as the time of cleavage. All claims, if not otherwise contravening provability, that arose and became fixed liabilities, absolutely owing, before the filing of the petition, are provable; claims not arising and becoming fixed liabilities, until after that, are not by the Act claims that are entitled to be proved. This was squarely decided in a case where an attorney performed legal services for a bankrupt, after the petition was filed and before the adjudication, and the court held that his claim for services, because it arose after the filing of the petition, was not provable, although otherwise meeting the requirements of a provable claim (1). It is essential that the claim be a fixed liability before the petition is filed to be provable.

§ 86. **Claims based on written documents.** As a general rule, claims based upon and debts evidenced by formal documents are provable in bankruptcy. All claims of that character that are fixed liabilities absolutely

(1) Re Burka, 104 Fed. 326.

owing, even though not due to be paid until after the proceedings were begun, are provable (2). The principle is well illustrated by an English case, which shows that the law is the same in that country. A party agreed by instrument in writing that six months after his death his executors should pay the claimant three thousand pounds. Later the obligor became bankrupt. Upon the question arising whether the promise to pay could be proved, the court decided it could (3). Included in this class are claims on promissory notes, bills of exchange, checks, bonds, written contracts, deeds, covenants, judgments, and the like. If a bankrupt owes a thousand dollars on a note not due at the time he became bankrupt, such a claim not only may, but must be proved, if the holder ever expects to realize anything from it. With certain exceptions to be noted hereafter (§ 94, below), claims based on judgments that existed at the time the petition was filed are provable even though based upon a claim that could not have been proven had it not been merged in a judgment.

§ 87. Claims based on express or implied contracts. Another extensive class of provable claims is that based upon express or implied contracts (4). These claims, though based on contracts, as were many in the preceding class, are not based on *written* contracts but upon verbal or implied agreements. In this connection may be noticed three forms of contractual obligations that are provable:

(2) Sec. 63a (1).
(3) Barnett v. King [1891] 1 Ch. 4.
(4) Sec. 63a (4).

(a) Those based on express, verbal or oral agreements; (b) those based upon undertakings implied from the acts of the parties; and (c) those that are implied by law.

§ 88. **Express verbal agreements.** Any obligation to pay money for goods sold, money loaned, or labor performed, upon an express verbal agreement, if not objectionable on the ground that it is verbal and not written, and if owing at the time the petition is filed, is provable. A merchant agrees verbally to give a party a hundred dollars a month for clerking in his store. If after the work has been done the merchant becomes bankrupt, the clerk may prove his claim in the proceedings. A jobber sells a merchant goods on open account from time to time, on orders given him by the latter. The jobber's claim is provable.

§ 89. **Undertakings implied from acts of parties.** Claims that arise from implied contracts may be deemed to be of two forms. The first form is where the implied obligation arises from the acts of the parties showing their intentions. A merchant hires a man to unload a carload of flour for ten dollars. He does so and is paid. The next week the man sees another carload to be unloaded; he unloads it, to the knowledge of the owner, who did not expressly authorize him to do so but said nothing. In such a case the owner's action would be evidence of an implied agreement to pay the laborer; his claim is provable.

§ 90. **Undertakings implied by law.** Contracts implied by law is the second form. Such a contract is only raised where a party procures the property of another, through

a wrong of such a character that he could be held liable, not on contract alone, but in an action of tort as well. Thus, a party steals another's horse and thereby adds to his property. If the thief becomes bankrupt, the claimant has two forms of remedy, one in tort, the other on the contract implied in law. See Quasi-Contracts, Chapter II, in Volume I. Claims having this dual aspect may be proved, although sounding in tort (5). A very similar case is where a jobber sells a retailer goods, on a fraudulent representation of the latter as to his financial standing. The jobber may hold the retailer liable in an action of tort for deceit, or he may hold him liable on the contract for the goods. In such a case, where the claimant has two such claims and may waive the tort claim and proceed upon his contractual right, he has a provable claim (6). A bankrupt may have received money or property from another by false representations or tricks of various kinds, other than the one just mentioned of making a false financial statement. Where the result of such fraud is the acquisition by the bankrupt of property or wealth which results in enriching him, the claimant may waive the tort claim and proceed upon his contractual claim, which is provable. Such a claim is discharged whether proved or not (7).

§ 91. **Unliquidated claims.** Unliquidated claims are those that have not been reduced to certainty as to the amount. The fact that a claim on a broken contract has

(5) Crawford v. Burke, 195 U. S. 176.
(6) Tindle v. Birkett, 205 U. S. 183.
(7) Crawford v. Burke, note 5, above.

not become fixed in amount does not prevent its being proved if it is otherwise provable. The amount of dividend to be paid on an unliquidated claim cannot be ascertained until it is reduced to a certainty. This process of reduction is in the hands of the court (8), which may authorize its liquidation in the court of bankruptcy, or order it to be liquidated in some other court. After liquidation, it participates in the dividends as other claims.

§ 92. **Same: Illustrations.** A merchant agrees to buy a carload of flour a week, for ten weeks, from a milling company; he refuses to take the first five cars, and when the sixth and subsequent cars are deliverable he is a bankrupt. In such a case, the damages for the failure to accept the first five cars are not liquidated and can only be liquidated by trial, yet they are provable. Furthermore, the damages for the failure to accept the remaining five cars after bankruptcy are provable (9). Similarly, if the milling company had on its part failed to perform, and had become bankrupt after the time for the performance of a part of the contract had transpired, the purchaser would have a provable claim for the entire damages (10). It has been held by the courts that, where a party agreed to retain another in his employ for a certain period, and, before the term expired, discharged him or made it impossible for him to continue, and then became bankrupt, the employee had a provable claim, even though the amount would have to be ascertained by trial,

(8) Sec. 63b.
(9) In re Saxton Furnace Co., 142 Fed. 293.
(10) In re Manhattan Ice Co., 114 Fed. 400.

and though the term did not expire until after the bankruptcy intervened (11). A breach of a contract to marry gives rise to damages, the amount varying in different cases depending upon the nature of the circumstances. Yet, such a claim is provable, being a claim based on contract (12).

§ 93. **Unprovable claims.** To assist in delimiting the claims that are provable, it will be useful to notice some of the more important claims that are not provable. It should be here noted that, if not provable, as a rule the claim is not dischargeable—a compensation the claimant gets for being compelled to abstain from pro rating with other claimants. Since not discharged, the bankrupt may be sued upon them, and his property subsequently acquired may be taken to satisfy the claim (13). The subject of dischargability of claims will be fully treated in the next chapter.

§ 94. **Certain judgments unprovable.** As stated (§ 86), judgments are generally provable. This is true even though the claim that is merged in the judgment is not a provable claim. Thus, a judgment for a wrong to another's person, such as a judgment for assault and battery, is provable; although the claim for the assault and battery was not provable before being reduced to judgment. But certain judgments are not provable. Among these are judgments, more accurately called decrees, for alimony (14), or for the support of wife and

(11) In re Silverman Bros., 101 Fed. 219.
(12) In re Fife, 109 Fed. 880.
(13) Goding v. Roscenthal, 180 Mass. 43.
(14) Audubon v. Shufeldt, 181 U. S. 575.

children, and judgments imposing fines (15) for criminal wrongs. The reason for making such judgments exceptions is not readily ascertainable, but that such exceptions exist is firmly decided. It would seem that they ought to be provable as any judgment, but such fact should have no effect on the question of discharge.

§ 95. **Torts not resulting in unjust enrichment.** A large class of claims recognized by the law is based upon wrongs to the person or property of another. Such wrongs do not, as a rule, result in enriching the wrong-doer; and, as they do not and so are not capable of being reduced to the proper form, they cannot be proved. It is only where a wrong results in enriching the wrongdoer that the claimant may elect to pursue him as on contract. Such wrongs as slander, libel, assault and battery (16), wilful or negligent injury to the person, and wilful or negligent injury of property are not recognized in the law as having the dual aspect of a tort and a contract (quasi-contract), and so they are not provable.

§ 96. **Contingent claims.** When proceedings in bankruptcy are instituted, some claims are contingent, i. e., there is an uncertainty as to whether any *fixed* liability will ever arise on them. Thus, a claim for rent to accrue in the future on a written lease is not provable (17), because of the contingent character of the claim, it not being absolutely owing at the time the petition was filed. If the landlord is evicted by some one with a better title, no

(15) In re Moore, 111 Fed. 145.
(16) In re Brinckmann, 103 Fed. 65.
(17) Watson v. Merrill, 136 Fed. 359.

rent will accrue; or, if the landlord ejects the tenant wrongfully, or reenters because the latter has broken some provison in the lease which was the basis for such renting, the landlord would have no claim against the tenant, and therefore no provable claim in bankruptcy. It is because the claim for future rent is thus deemed contingent in law, that courts do not permit it to be proved. On the other hand, however, any rent that has become absolutely owing by having become due before filing the petition is provable (18), and this is the rule even though the occupancy is to occur subsequent to the date the rent becomes due. As the claim for future rent is not provable, it is not discharged; and the bankrupt may be held liable for it out of his future acquisitions (19). Again, if a person sells stock in a corporation to another, guaranteeing that it will draw a dividend of five per cent. within a year, and before the year ends the guarantor becomes bankrupt, the party guaranteed has no provable claim (20), as the question whether any duty to pay would ever become fixed was unknown at the date of bankruptcy. These contingent claims, like the others mentioned, are not dischargeable, and the bankrupt's future property may be taken to satisfy them.

§ 97. Same: Secondary liabilities upon commercial paper. The most noteworthy exception to the rule that contingent claims are not provable is the case of the holder of a note, upon which the bankrupt is guarantor or indorser. In either case he is only obliged to pay at the

(18) In re Mitchell, 116 Fed. 87.
(19) Goding v. Roscenthal, 180 Mass. 43.
(20) Re Pettingill, 137 Fed. 133.

maturity of the instrument *if* the party primarily liable does not pay; and, as indorser, he is under no obligation to pay until after a demand of the maker on the date of maturity and notice to the indorser of this fact. With such a limitation upon the duty to pay, the claim of the holder is obviously contingent, yet the courts hold that such a claim is provable (21). But they have generally refused to recognize any contingent claim as provable, except the claim of the holder of a note against its guarantor or indorser who have become bankrupt.

§ 98. **Claims to which bankrupt has defense.** Although a claim as asserted may be prima facie provable, it does not follow that it will be allowed. It has been seen that the trustee becomes the successor to any title to property the bankrupt had. In a similar way he becomes the successor to all the defenses the bankrupt had to protect that property. Any defense the bankrupt had to a provable claim may be asserted by the trustee—in fact it is his duty to assert it (22). Thus, the trustee is in duty bound to assert the defense that the claim should not be allowed because not in writing (23), if the statute of frauds requires a writing; and, on principle, he ought to set up the defense that the claim was outlawed. In a very similar manner, a claim asserted on a contract should be defeated by a defense of a breach of the contract by the claimant, if such breach by him exists. Creditors may also object

(21) Moch v. Market Street Bank, 107 Fed. 897.
(22) In re Wooten, 118 Fed. 670.
(23) Note 22.

to the allowance of claims in order to protect their own (24).

§ 99. **Priority of claims.** Aside from the expenses of administration, which are made prior to all others, claims are entitled to priority in the following order (25): (1) Taxes due to the United States, state, county, district, or municipality. (2) Wages due to workmen, clerks, or servants, which have been earned within three months before bankruptcy, not to exceed three hundred dollars to each claimant. (3) Claimants who are given priority by the laws of the state where the proceedings are pending.

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(24) Sec. 57c; In re Lorillard, 107 Fed. 677 (where they did so).
(25) Secs. 64, a and b.

CHAPTER VI.

DISCHARGE.

Section 1. In General.

§ 100. **Term explained.** By a discharge in bankruptcy is meant the release of a bankrupt debtor from the further duty to pay the debt or obligation. If a bankrupt's estate pays no dividend and he procures a discharge, he owes no duty as a matter of law to pay any part of the claim. If his estate pays a dividend of fifty cents on the dollar and he procures a discharge, he owes no duty to pay the portion remaining unsatisfied.

§ 101. **Questions involved.** In considering the discharge of a bankrupt two distinct matters should be noted. First, assuming a bankrupt has procured a discharge, what debts and obligations are affected by it so that the debtor owes no further duty to pay, and what are not affected thereby? The determination of these questions rests upon the provisions of the law under which the discharge is procured. Second, upon what grounds may creditors prevent a bankrupt from procuring any discharge whatsoever? There are a number of these considered below (§§ 112-20). These matters will be treated in this order.

§ 102. **Historical statement.** The earliest English bankruptcy law contained no provision concerning a discharge.

The debtor was obliged to give up his property without receiving any benefit whatever from it; he was burdened with debts, and hampered by his creditors, who took every dollar he acquired as fast as he acquired it to satisfy their claims. Under such a handicap the prospects were only slight of the bankrupt's ever again being an active and energetic factor in a commercial or a business way, but rather favorable toward his being a charge upon the community in the course of time. The short sightedness of such a policy was realized in less than two centuries in England, and since then nearly all the bankruptcy systems have provisions for the discharge of a debtor. The early notion of having no discharge feature at all was supplanted by the idea that it must be made a difficult matter to get a discharge. This characteristic was especially pronounced in the national act of 1867.

§ 103. **Liberality of present Act toward discharges.** The legislation of 1898, however, takes a more liberal view and one more consonant with political and social economy. Instead of many trifling causes for preventing a bankrupt's discharge, it contains comparatively few and those adapted to assist the trustee and creditors in fully discovering the assets. Thus, creditors may oppose a discharge on the ground that a bankrupt, for the purpose of concealing his financial condition, failed to keep books of account (1), or, at any time within four months before the filing of the petition, transferred, removed, destroyed, or concealed any of his property, for the pur-

(1) Sec. 14b (2).

pose of defrauding his creditors (2), or refused to obey any lawful order of the court of bankruptcy (3), etc. A fuller statement will be given in subsequent subsections. This liberality is prompted by the thought that it is better for the business community that a debtor who has not been too dishonest be relieved from his burdens and permitted to go, unhampered and unfettered, with renewed ambitions, free to add his energies to the general progress, than to keep him a lifelong slave to his creditors. A greater social gain will result from again having him added to the self-supporting wealth-producing class, than to have him entirely absent therefrom, a possible charge upon the community, paying the penalty of having done some trifling wrong, sufficient, however, under the unwise provisions of the law, to prevent his discharge.

§ 104. **Who may apply for a discharge and when?** Any person, natural or artificial, may apply for a discharge. Not even corporations (4) are excepted from the right to apply for and receive a discharge, if no reasons are shown by objecting creditors to cause the court to deny it, although under the act of 1867 a corporation could not procure a discharge. The application may be made at any time after one month subsequent to the adjudication, and within twelve months thereafter (5). The action of the court is procured by the bankrupt filing a petition, setting out that the bankrupt was duly adjudicated, that he had surrendered all of his property and complied with

(2) Sec. 14b (4).
(3) Sec. 14b (6).
(4) In re Marshall Paper Co., 102 Fed. 872.
(5) Sec. 14a.

all the requirements of the law and of the orders of the court, and praying for a discharge of all his debts except those exempted by law.

§ 105. Nature of proceeding. As a matter of practice in bankruptcy, the bankrupt makes his application to the court for a discharge, while the court is in the act, through the trustee, of collecting the assets, settling the claims, selling the property, and paying the dividends. With these administrative matters, however, the application for the hearing or the discharge has no necessary connection. It is a unique and independent proceeding, in which the bankrupt challenges his creditors, who reside in the state or jurisdiction of the bankruptcy court or who have proved their claims in bankruptcy, to show by what are known as objections filed to his application why he should not be freed from further obligation to meet his debts. The evidence to sustain the objection is heard by the court, and it determines whether a discharge should be granted or not. If a discharge is granted, it is given in general terms, and states that debts that are by law excepted from the operation of the discharge are not affected. To determine whether or not a particular debt is excepted, an independent proceeding, based on the theory that the debt was not discharged, is necessary. In this action, the bankrupt is obliged to plead his bankruptcy and test the question of the dischargeability of the claim(6).

Section 2. Debts Affected.

§ 106. Debts that are discharged. As a general rule all provable debts are discharged (7). To determine what

(6) Hellman v. Goldstone, 161 Fed. 913.
(7) Sec. 17a.

debts are provable, a reference should be made to the statement of the law on that subject heretofore given (8). In general all claims constituting a fixed liability evidenced by judgements or written instruments are dischargeable, as are all claims based on open accounts and on contracts expressed or implied (9). These are the most important provable claims, the only others mentioned by the Act being certain costs of court in litigation pending at the date of bankruptcy, of little importance.

§ 107. **Debts not discharged.** The converse of the rule just stated holds true also, i. e., debts that are not provable are not discharged. As has been stated (§§ 93-96), contingent claims, claims based on torts of such a character that the tort cannot be waived and the claim asserted in contract, decrees for alimony, and judgments for fines and penalties are not provable, and as a consequence are not dischargeable.

It does not follow, however, that all provable claims are discharged, for the law expressly provides that certain claims shall not be discharged; and, as a consequence, even if provable, they are not affected by the discharge. Thus, to mention a few of that class, liabilities for taxes, for obtaining property by false pretenses or false representations, or obligations created by an officer or fiduciary in embezzling or misappropriating property held in trust by him are not discharged (10).

§ 108. **Same: Illustrations.** In Katzenstein v. Reid

(8) See Chapter V, above.
(9) Sec. 63a.
(10) Sec. 17a.

(11) a merchant bought goods of a dealer upon a misrepresentation as to his financial condition. After he had procured a discharge the vendor sued him. He pleaded his discharge. The court held that, his debt having arisen out of a transaction whereby he procured property by false representation, it was not discharged. This case also passed upon the question whether the fact that the defrauded party had proved his claim in the bankruptcy proceedings precluded him from making any claim after the discharge, based on the fraudulent transaction. The court said: "The statute does not condition the right of a creditor to sue and establish his claim against a discharged bankrupt on the fact that he did not prove up his claim before the referee and receive dividends; but it declares that certain debts are not released by the discharge, and the doing of these things will not estop him from prosecuting his suit" (12). It has also been held that making proof of the claim with the bankruptcy court, based on the theory of a contractual claim, did not waive the right the defrauded creditor had to proceed in an action based upon the fraud despite the discharge (13). And the same rule has been laid down in cases where the discharge was granted under the law of 1867 (14).

§ 109. **Provable claims discharged whether proved or not.** Creditors at times, being ill advised, fail to prove their claims and to participate in the distribution of the proceeds, thinking that thereby they will not be prejudiced

(11) 16 A. B. R. 746 (Tex.).
(12) Ibid, 750.
(13) Frey v. Torrey, 70 App. Div. 160; affirmed in 175 N. Y. 177.
(14) McBean v. Fox, 1 Ill. App. 177.

in their rights to make demand upon the bankrupt when he has acquired more property. This is only true at times when the national act is not in force and a discharge is sought under the state law. In such circumstances, if a creditor is a citizen of another state and does not prove his claim against the bankrupt, his claim is not affected. If he is a citizen of the state, however, and does not prove his claim, it is discharged anyway (15). The same holds true under the national Act as to citizens residing in the United States, and the test is not whether the debt was actually proved but whether it was susceptible of being proved (16).

§ 110. Revival of discharged debt. The nature of a discharge is such that it is merely effective for the purpose of defending against a suit based on a discharged claim. If the discharge is not interposed in such case, the judgment is valid and cannot be reversed. The advantage of a discharge may thus be waived by failure to plead it when sued upon the claim. It may also be waived by a new promise to pay, made in plain and unmistakable words, to which the creditor accedes (17). After such a promise, a suit may be maintained on the claim as if no discharge had been procured.

Section 3. Opposition to Discharge.

§ 111. Who may oppose a discharge? In the order of development after determining what claims are and what are not dischargeable, in case a discharge has been

(15) Baldwin v. Hale, 1 Wall. 223.
(16) Crawford v. Burke, 195 U. S. 176.
(17) International Harvester Co. v. Lyman, 10 A. B. R. 450.

granted it must be determined under what circumstances a discharge may be entirely denied the bankrupt. It was noted (18) that the last bankruptcy act made it an easy matter for creditors to oppose a discharge and succeed in depriving the bankrupt of it, despite the fact that he had gone through the process of surrendering his property. The present Act provides methods of depriving a bankrupt of a discharge also, but the ease with which to deny it does not appear so prominently as in the prior law.

The law provides that parties in interest (19) may oppose an application for a discharge. This is done by filing specifications of objections, based upon the grounds the act gives for opposing a discharge (20). The "parties in interest" referred to are creditors, quite obviously, those having provable and dischargeable claims. This is the rule, even though the creditor does not prove his claim and seek to participate in the dividends (21). On the other hand, one holding a claim that is not provable and therefore not dischargeable, cannot oppose the discharge (22); nor can the trustee, it would seem, as he is not interested in the question of the discharge but merely in the collection and distribution of the assets.

§ 112. Grounds of opposition. The grounds of opposition are several and deserve separate treatment. In general the grounds are of such a character as to have a tendency to coerce the bankrupt to surrender his prop-

(18) See § 102, above.
(19) Sec. 14b.
(20) Sec. 14b.
(21) In re Bernberg, 121 Fed. 942.
(22) In re Servis, 140 Fed. 242.

erty fully and completely to his creditors. Of such a nature are the portions of the law providing that the bankrupt shall not have a discharge, if he has concealed from his trustee property belonging to his estate; made a false oath in any bankruptcy proceeding; destroyed, concealed, or failed to keep books of account from which his financial condition could be ascertained; transferred, removed, destroyed, or concealed property from his creditors at any time within four months of the bankruptcy with intent to hinder, delay, or defraud his creditors; or refused to obey any lawful order of, or to answer any material question approved by the court (23). To impose a penalty for the violation of such provisions has a tendency to coerce the bankrupt to make a complete disclosure of all his affairs after bankruptcy, and to keep and preserve complete accounts of them before. The basis of these grounds is readily discernible. But the basis of an opposition on the ground that the bankrupt procured property from a creditor upon a materially false statement in writing made at some remote time before, and that he had been granted a discharge in a voluntary proceeding within six years, are not so easily discernible; although there seems good policy in denying a debtor the privilege of procuring a discharge too often. While this does not debar him from going into bankruptcy more frequently than once in six years and having his property distributed by the court, it does prevent his doing so with the expectation of procuring the usual benefit and favor of a discharge upon having done so.

(23) Sec. 14b.

§ 113. **Commission of offense punishable by Act.** The Act has made it a criminal offense, punishable by imprisonment for two years, for a person knowingly and fraudulently to conceal from his trustee, while a bankrupt or after his discharge, any property belonging to his estate in bankruptcy, or to make a false oath or account, in or in relation to any proceeding in bankruptcy (24). The Act says that parties in interest may also oppose a bankrupt's discharge on the ground that he has committed an offense punishable under its provisions (25). The only offenses for which a bankrupt is punishable are the offenses just mentioned, commonly known as concealing assets and making a false oath.

§ 114. **Concealment of assets.** The bankrupt can be deprived of a discharge on this ground, only in the event that it is shown by the evidence that he has knowingly and fraudulently concealed assets (26). The proceeding is analogous to a criminal one and an intent to conceal must be shown. The concealment must be from the trustee, either before or after a discharge. A concealment in a case where no trustee was appointed would not be a basis for opposition to a discharge (27).

§ 115. **Making false oaths.** In order successfully to oppose a discharge on this ground the opponent must show, as in case of concealment of assets, that the bankrupt knowingly and fraudulently made a false oath or account. The false oath may consist of false testimony

(24) Sec. 29b.
(25) Sec. 14b.
(26) In re Froeder, 150 Fed. 710.
(27) In re Toothaker Bros., 128 Fed. 187.

given on an examination made by the trustee to discover assets (28). And it would seem that false swearing in the hearing on the creditor's petition for an adjudication would be equally effective to bar a discharge. The false oath may be contained in the schedule of the bankrupt's assets, by either omitting to state truthfully all his property, or by making a false statement with reference to the debts he owes, or to whom owing, with the expectation of deriving some personal advantage. In a case where the bankrupt failed to schedule property from which he had realized substantial benefits as if he were the owner, but to which he claimed he had no title, the court held he made a false oath (29).

§ 116. **Destroying, concealing, or failing to keep books of account.** This basis of opposition is rather simple. The Act requires that the destruction, concealing, or failure to keep books of account must be done with the intent to conceal his financial condition (30). And in a case where it was shown that the bankrupt omitted to state in his books what his indebtedness was, but where the evidence did not show this omission was made intentionally, the court refused to bar a discharge (31).

§ 117. **Fraudulent transfers made within four months of bankruptcy.** A bankrupt's discharge may be denied, if it is shown that he has, at any time within four months preceding the filing of the petition, transferred, removed, destroyed or concealed, or permitted to be removed, de-

(28) Wechsler v. U. S., 19 A. B. R. 1.
(29) In re Gailey, 127 Fed. 538.
(30) Sec. 14b (2).
(31) In re Brice, 102 Fed. 114.

stroyed, or concealed any of his property with intent to hinder, delay, and defraud his creditors (32). This provision was not added to the law until 1903, and as a consequence few decisions have arisen under it. This ground of opposition is the complement of the one permitting opposition on the ground that the bankrupt concealed property from his trustee. The former consists of concealment before the bankruptcy, and the latter thereafter after a trustee has been appointed. The concealment under the former is sufficient if a mere concealment is shown; under the latter ground of opposition it must, however, be shown that the property is still recoverable. The mere fact of concealment from the trustee is insufficient (33); it must be a concealment of property belonging to the estate.

§ 118. Procuring property on credit upon a false written statement. As stated above (34), it is not any easy matter to discern the basis of permitting a creditor, from whom the bankrupt procured property on credit by a materially false statement in writing (35), to oppose a bankrupt's getting any discharge whatever from his debts. It would seem sufficient to prevent his claim being discharged, without giving to him the power of preventing all others being discharged. The explanation of nearly all the other grounds of opposition rests upon the fact that such grounds of preventing a discharge will facilitate the discovery of the truth with reference to the bank-

(32) Sec. 14b (3).
(33) Vernon v. Ullman, 17 A. B. R. 438.
(34) § 112, above.
(35) Sec. 14b (4).

rupt's affairs and tend to swell the assets for creditors. It was at one time thought that the materially false statement must be made directly to the party who advanced property on credit. This narrow view has, however, been discarded, and it is now held that if a materially false statement concerning the bankrupt's financial condition was made to a commercial agency, which communicated its contents to another, who thereupon sold goods to the bankrupt, the party relying can oppose the discharge (36).

§ 119. Previous voluntary discharge within six years. The Act says that a discharge may be barred, if in voluntary proceedings the bankrupt has been granted a discharge within six years (37). This provision has no connection with involuntary cases. Creditors may file as many petitions as they can sustain, and, upon the success of each, if the bankrupt has not in any way placed himself in a position where a discharge may be barred by one of the recognized grounds, he can procure a discharge. If, however, he has procured a discharge in a voluntary case, and within six years seeks a discharge in an involuntary proceeding, the former discharge is a bar (38). On the other hand, a refusal to grant a discharge in a voluntary case, even though within six years, is no bar to a discharge in a voluntary proceeding. The statute mentions only cases where a discharge has been granted.

§ 120. Refusal to obey orders or answer questions of court. The Act makes it a basis for denying a discharge that a bankrupt, in the course of bankruptcy proceedings,

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(36) In re Pincus, 144 Fed. 621.
(37) Sec. 14b (5).
(38) In re Neeley, 134 Fed. 667.

refused to obey any lawful order or to answer any material question approved by the court (39).

NOTE.

§ 121. Advantages to creditors of national law over diverse state laws. Manufacturers, bankers, insurance companies, wholesale houses of all kinds, in fact, nearly all commercial operators of importance, have, under the modern advantages of telegraph, telephone, and rapid transmission of the mails and articles of commerce, spread their business over the entire United States, or at least into one or more neighboring states. Under such conditions, with no Federal law in force but with as many state laws as there are different states, it is necessary that the operator be familiar with the insolvency or bankruptcy law of every state, its peculiarities, and the possibilities under it, in order to safeguard his rights. Thus, if the state law where the debtor resides permits preferences, it is not sufficient merely that the distant creditor know this fact, but it is essential that he be exceedingly diligent and vigilant in order to compete on fair terms with other creditors, nearer to the common debtor, and having readier access to him and to the courts to secure transfers from him and liens and attachments against him.

The state laws permitting preferences and legal liens favor the diligent, permitting them to satisfy their claims in full to the exclusion of others. They foster a keen struggle between creditors to be the first to procure a lien

(39) Sec. 14b (6).

or preference, and tend toward inequality among creditors. The Federal law, on the other hand, which avoids preferences and legal liens procured within four months of bankruptcy, stands for equality among creditors and eliminates the struggle for an advantage by way of preference or legal lien.

Two obvious results are accomplished by the Federal Act. First, the work of the commercial credit man for large concerns is greatly simplified and made safer. The uniformity sought in such branches of the law as that of commercial paper, sales, and the like, which have been largely accomplished by the concerted action of many states adopting substantially the same code on the subject, is accomplished in bankruptcy by one piece of legislation by Congress, the work of many legislatures done by one. This of itself would seem to be a justification for the retention at all times of a national bankruptcy act. If any features of such a law become objectionable, amendment should be resorted to and not repeal.

Second, the spectacle of a few favored creditors appropriating a debtor's entire property to satisfy their claims, to the exclusion of the rest, is entirely eliminated by the salutary features of the last two Federal acts, preventing preferences and liens procured by legal proceedings, while the debtor is insolvent. While some states prohibit preferences, this is not the universal rule. Under the operation of the Federal law there can be no doubt, and the unseemly race of assignees, attachment, and execution creditors to be the first to seize the debtor's property is avoided, as well as the injustice to the less fortunate creditors.

JUDGMENTS

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JUDGMENTS.

§ 1. Outline. The principal points to be considered regarding judgments are: (1) their nature, essentials, and kinds, including a survey of the elements of jurisdiction; (2) the record of the judgment; (3) vacating and amending judgments; and (4) the effect of judgments. These will be considered in the order named.

Section 1. Nature, Essentials, and Kinds of Judgments.

§ 2. Judgment defined. Many different definitions of a judgment have been given, some superior on one account, some on another. Lord Coke said that a judgment is the very voice of law and right, signifying that it is the application of the wisdom of the law in disposition of the particular case. A more practical definition is that it is the final determination, by a court of competent juris-

diction, on the matter submitted to it by the complaint or some person or persons; which is usually a complaint against other persons, but may be a mere request to pass upon matter without any opposing party, such as adjudication of a salvage of shipwrecked goods at sea, that they are wreckage and that so much belongs to the salvors for saving them. In examining this definition it is necessary to notice that many *orders* are made by the court in the progress of every trial, which are not properly judgments; of these examples are seen in such orders as that the case shall go over to the next term, that the plaintiff shall give security for costs; and, in addition to these, are *rulings,* that this evidence is not competent and shall be excluded, and the like, which are not even considered as orders. The judgment, properly speaking, is the final disposition of the case, though not necessarily of the merits of the dispute. Judgment that the case be dismissed, because the plaintiff has failed to include certain persons as defendants who should be included, does not go to the merits of the question at all, and in no way prevents the immediate prosecution of a new suit against the proper parties, including all the parties to the present suit; but it is in the strictest sense a judgment, because it puts an end to the particular suit. It has often happened that appeals have failed, because the appeal was taken before judgment given, the parties assuming that the direction that such a judgment be drawn up was itself a judgment, instead of an order for judgment. Such technical distinctions are not conducive to justice, nor to the respect for the courts which should be entertained by the people; and it is believed

that they are not strictly sound. For the judgment is not the entry which the clerk of the court makes, but the order which the court makes, of which the clerk's entry is only a memorandum.

§ 3. **Same: Illustrations.** A few illustrations will make this clear. Suppose the clerk makes an entry that judgment was given, when the court had ordered nothing of the kind. Is that a judgment? It has been held that the court may rectify such errors, whenever they are discovered, even years afterwards; but, if a judgment is in fact given by the court, and the judge later makes up his mind that he was wrong in the judgment he gave, that error cannot be corrected by him after the term at which the judgment was pronounced. Again, it is clear that no execution can be valid unless there is a judgment warranting it; and yet it has been held in several states that an execution, issued after the judgment is pronounced by the court, is not void, merely because the record of the judgment was not written up till after the execution was taken out and property seized under it. Again, if a judgment is rendered in vacation time, that is after the court has adjourned definitely to the next term, or without day, as it is called, that judgment is void according to all the authorities, and yet it is admitted by all that it is all right to make entry in vacation time of the judgments rendered in term time. Ordinarily, the official record is the only proper evidence to prove that a judgment has been given by the court, which is believed to have had as much as anything to do in creating the erroneous notion that the record entry is the judgment; instead of the true

doctrine, that the judgment is the order made by the court, of which the clerk's record is the contemporaneous, official, historical memorial. Yet it has happened that judgments have come into question in later cases, and proof of them has been allowed by other evidence, upon showing some extraordinary accident which prevented the entry ever being made. Such was the case of a justice of the peace who heard the parties, and at the end of the hearing pronounced judgment upon the matter orally at once, but died a few days later, without having made any docket entry of his judgment (1).

§ 4. **What is a court?** As a judgment is a final determination of a controversy by a court, it follows of necessity that the order is not a judgment unless the body pronouncing it was a court. A court has been defined as a place where justice is judicially administered; because in the old days the feudal barons assembled their followers in the open space in their castles to debate and decide disputes between any of these followers. But the word court involves more in its modern judicial meaning than the place where the meeting is held. In the legal sense, a court is a body of the government, duly constituted and assembled for the purpose of deciding such matters between opposing parties as are brought before it and the law creating it enables it to decide. It is necessary that the body be created by the proper governmental authority. If it is constituted by the agreement of the parties submitting the question for decision the determination it gives is not a judgment; it is at most only an award of

(1) Hickey v. Hinsdale, 8 Mich. 267.

arbitrators. If the body was created by rebels or insurgents, and not by the legal government, its determination would not even be an award of arbitrators, unless the matter was submitted to it by consent of the parties, nor even then if what they expected was a judgment of a court; that is, unless their agreement included the creation of the body to try the question, and not merely an agreement to submit the matter to a body supposed to be already legally created. If the body was created by the proper legislative authority as a court, but for some reason the statute was unconstitutional, it has been denied that the body assembled and acting under such an invalid law is not even a de facto court. If the body was created by the proper legislative authority by a valid law, it is not a court unless the legislative intent expressed by that law was that the body should be a court. If the legislature declares that the supervisors of the county shall be a body to pass on the bills due from the county and order their payment, it does not follow that the legislature intended that the board of supervisors should be a court, nor that their determinations should be judgments. Matters are not brought before a board of supervisors as they are before a court, by issuing a summons, serving it on the opposite party, uniting on an issue, taking testimony, and so forth. The bill is filed in an informal way. Often the board takes it up in the absence of the parties. They are entitled to no hearing nor argument. The board need have no testimony, and may decide on their own information and opinions. Such a determination is no judgment. If the legislative authority

declares by a valid law that such a body shall be a court to try such cases, there is no court in fact till the authorized body is organized and assembled. From this it follows: (1) that the legal business of the body must be judicial; (2) that the body is created by a valid law of a real government; (3) that it is properly organized and assembled, which includes officers, time, and place.

§ 5. **Elements of jurisdiction: Compliance with statutory requirements.** Jurisdiction has been defined to be the power to hear and determine a matter submitted. 1. In order for a court to possess this power it is clear that the court must be duly and legally constituted and regularly assembled, as stated in the preceding subsection. 2. Further, the question or case on which it assumes to act must be of the class in which the law of the court's creation empowers it to act; if it be a criminal prosecution, it is essential to jurisdiction that the law under which the court acts has empowered that court to sit in such cases; one court may be empowered to sit in probate of wills, and another to try for alleged crimes, and yet neither court be empowered to sit in a case which would be proper for the other to decide.

3. Another essential to jurisdiction is that the law defining the court's powers has enabled it to make such a judgment in a proper case, as it has attempted to make in the given case. A judgment by a justice of the peace that a man be hanged, for an offense of which he is charged before such justice, would ordinarily be absolutely void, and need not be appealed from; for in no case at all is the justice enabled to give such a judgment. His judg-

ment for a greater amount than the law enables him to render in any case would be likewise void, though the particular case justified such a judgment. But suppose that the law has authorized the justice to try cases involving less than $300, and in such a case a man claims a sum less than $300 against another, but gives no proof warranting any judgment at all. It is clear that the justice should not give the plaintiff judgment for any sum; but it is equally clear that what amounts to proof of a case is the very question which the law has empowered the justice to decide, and which the case before him requires him to decide. Power to decide includes power to decide either way—to decide it the right way or the wrong way—to say which is the right way, and what the proper amount. If the justice errs on this, it is error only; and the party aggrieved by this erroneous judgment must submit to it and abide by it, or appeal from it to some other court to have it corrected.

§ 6. **Same: Submission of question to court.** 4. Another element essential to jurisdiction is that a case shall have been brought before the court, and that the case on which the court assumes to pass is the case submitted to it for decision. The court cannot decide every possible question between contending parties, merely because it has been asked to pass on a particular question; nor can it act of its own motion on any question, unless a question has been submitted to it for decision. Courts must be set in motion by complaint or petition, and cannot originate a case of their own motion; but when the case is once before it, the court may dispose of it on motion, or of its own motion.

Suppose a man brings an action against his wife to settle title to land, the court could not decree a divorce between them in such an action, though the proof offered on the title to the land should show ample ground for a divorce; for that is not the point submitted to the court for decision. The court can decide only what is submitted to it for decision; but when the question arises as to what is submitted, we get into a much more difficult field. On this the general proposition is, that the pleadings need not be regular, need not show that the party is entitled to what he asks for, need not be so good but that the case would be dismissed because of the defect, if the point were properly raised; it is enough that it appears that the point decided was the point the party wanted decided, or was essential to the decision of that point.

§ 7. **Same: Judgments binding property.** 5. To make a judgment binding on the title to any particular property, it is essential that the property be brought within the court's control. If it be land within the court's territory, sufficiently described in the papers in the case, no actual seizure of it is necessary to enable the court to give judgment binding on the title to it, unless the statutes under which the suit is prosecuted require that to be done; and it is even a disputed point as to whether failure to observe the statutory requirements is not a mere irregularity, which can be taken advantage of only in a direct proceeding in the same court and action, or by appeal. But it is essential to jurisdiction of the thing, that the purpose of the action was expressly to fix the right to that property. If the property was at a place out of the court's territory,

no judgment it can render can bind the title to that property, though that may be the direct purpose of the action in which the judgment is rendered which is claimed to bind that property. Observe that what is here stated is that the title to the property is not determined thereby. If the court has the party before the court, it may order him to do something concerning property out of the state, and imprison him for contempt until he will obey the order. If he escapes without doing what he is ordered to do, the order does not affect the title to the property out of the state. This doctrine has been very much theorized upon in garnishment of debts to non-resident creditors or from non-resident debtors; and it has been claimed that the debt has locality, and is situated where it is payable, or where the debtor resides, or where the creditor to whom it is due resides. But this question has now been finally put at rest by the Supreme Court of the United States (1a), which holds that one who owes another a debt may be charged as garnishee therefor, wherever he can be found and served with process, regardless of where he lives, where his creditor lives, or where the debt is payable; and that, if he pays the debt on such a garnishment, that payment will be a good defense to any suit by his creditor for it in the same or any other state, provided the garnishee notified his creditor of the garnishment, so as to give him an opportunity to defend the garnishment.

§ 8. **Same: Personal judgments.** 6. Another essential

(1a) Chicago, etc. Ry. v. Sturm, 174 U. S. 710; Harris v. Balk, 198 U. S. 215.

to jurisdiction in any case to render a judgment binding on any person as a personal charge, which is called a judgment *in personam,* is that the person to be so bound must have been duly brought into court, so as to give him an opportunity to defend, called his day in court, before such judgment is given against him. He may thus be brought before the court by his voluntary formal appearance in the court and submitting to its jurisdiction; or by making service on him in any manner which he may have expressly or impliedly agreed and directed in advance shall be a sufficient service on him in such a case; or he may be brought within the court's jurisdiction, so as to enable the court to decide in personam against him, by formal service of the court's process on him in person at any place within the state, provided the law of the state authorizes such a service. But any statute of any state declaring that a person residing out of the state may be served by publication of process in the state or personal service on him out of the state, and that such service shall authorize the court to proceed to judgment in personam against him the same as if he had been personally served in the state, would be in violation of the Fourteenth Amendment to the Constitution of the United States, which declares that no man shall be deprived of life, liberty, or property without due process of law (2).

§ 9. **Same: Opportunity to be heard.** 7. Since the purpose of service of process is to enable the party to make defense, it follows that a further element of jurisdiction is that an opportunity to be heard in defense shall have

(2) Pennoyer v. Neff, 95 U. S. 714.

been given the party before passing judgment upon him. For, if the court holds that the party summoned is one not entitled to standing in the court, and thereupon orders his appearance stricken out, and immediately enters judgment against him, that judgment is absolutely void and need not be appealed from. It must not be inferred from this statement that a judgment is void, merely because the party was not allowed to make his defense at so late a time, or not allowed to make the particular defense he wished to. The doctrine extends only to denial of all right to be heard at all.

Beyond the points made above, there is a wide field in which no positive statements can safely be made, in which one court has held that a departure from the prescribed mode of procedure was fatal, and another court has held that it was only an irregularity.

§ 10. **Summary of essentials of judgments.** It has seemed necessary to give thus much attention to the vexatious subject of jurisdiction, in order to get a clear and complete conception of what a judgment is; and this brings us to the end of the first topic, the definition of a judgment; and we may now state the conclusion that a judgment is the sentence of the law pronounced by the court upon the matter contained in the record. From the foregoing review of our definition, we may discern the following essentials of a judgment: (1) If nothing be done, if there be no pronouncement, clearly there is no judgment. (2) If the pronouncement be not in the nature of a sentence, it is no judgment. (3) If pronounced by any body other than the court, it is no judgment.

(4) If upon matter that court is given no authority by law to hear and determine, it is no judgment. (5) If that court is not given authority by law to pronounce such a judgment in any case, it is no judgment. (6) If the matter pronounced upon be not before the court, it is no judgment. (7) It is not a judgment in personam unless the person pronounced against was before the court.

§ 11. **Kinds of judgments.** Judgments may be classified from various points of view, according to the purpose intended to be served by the classification. The following classifications are some of the most important: (1) As to their effect in disposing of the action, judgments are either interlocutory or final. As we have seen, only the final are really judgments. Final judgments are those which completely dispose of the particular action, though not necessarily of the controversy involved in it. (2) Judgments are either absolute or nisi, according as they are to have effect at all events, or only upon the happening or not happening of some specified event. (3) As to the place where rendered, judgments are either domestic or foreign. A domestic judgment is one rendered by a court of the same sovereignty. A foreign judgment is one rendered by any other court. (4) As to the state of the pleadings at the time the judgment was rendered, it is: (a) on an issue of law; (b) on an issue of fact; (c) when the pleadings raise no issue; or (d) on abandonment of the suit by the plaintiff. (5) As to the binding effect, the judgment is either valid or void; and if valid is either in personam or in rem, and, if in rem, is either in rem generally or as to particular persons or

purposes. The difference in the binding effect of judgments in personam, and judgments in rem, either generally or specially, will be explained more fully when we come to consider the effect of judgments.

Section 2. Record of Judgment.

§ 12. **Definition.** The record in judicial proceedings is the written history of the proceedings and transactions of the court, kept as a perpetual memorial therof.

§ 13. **Former English practice.** In primitive times all the proceedings were oral in open court, the declaration, pleadings, judgment, everything; and the judge or his clerk took rough notes of the proceedings as they progressed. These were finally amplified on parchment, and filed as a perpetual memorial. When the pleadings came to be made in writing on paper, this custom of copying them on parchment was continued. As soon as the verdict had been found and reported, the signature of the proper officer was obtained on a sheet of paper called a final judgment paper. This was called signing judgment. As soon as this was done, the successful party might make the record on parchment. This was called entering the judgment of record; and when this parchment copy had been filed it was called the judgment roll. Leaving the roll in the treasury of the court was called filing the record. The clerk kept a book in which all these records were indexed. Making the entry in the index was called docketing the judgment.

§ 14. **Same: Example.** The following, copied from

Wentworth's Pleading, will give some idea of the nature of these records:

ENGLISH JUDGMENT ROLL.

Pleas before our lord the king at Westminster of the Term of St. Michael, the twenty-sixth year of the reign of our sovereign lord George the Third, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth, in the year of Our Lord 1785.—Roll, Stormont and Way.

London, Be it remembered, that in the Term of the Holy Trinity last past, before our lord the king at Westminster, came Robert Hunter, by Giles Blake his attorney, and brought into the court of our said lord the king then there his certain bill against John Bermingham, being in the custody of the marshalsea of our said Lord the King, before the king himself, of a plea of trespass on the case, and there are certain pledges for the prosecution, to wit, John Doe and Richard Doe; which bill follows in these words, to wit; London, to wit. Robert Hunter complains of John Bermingham—[here follows the bill in full except the signature, then the imparlance, plea, and continuance].

Afterwards, that is to say, on the day and at the place within mentioned, before the Honorable Francis Buller esquire, the justice within mentioned, John Way gentleman being associated with him, according to the form of the statute in such case made and provided, came as well the within named Robert Hunter, as the within named John Bermingham, by their respective attorneys within mentioned, and the jurors of the jury within mentioned being called likewise came; who, being tried and sworn to speak the truth concerning the matters within contained, and after evidence being given to them of and upon the within contents, went from the bar of the court to discuss their verdict of and upon the premises, and after the said jury has discoursed and agreed among themselves they come back to the bar and say that the said John Bermingham did undertake and promise in manner and form as in the said declaration is complained against him; and they assess the damages of the said Robert Hunter on occasion of the premises mentioned in the sum of fifty-eight pounds three shillings and sixpence, over and above his costs and charges by him laid out in his suit in this behalf and for those costs and charges to forty shillings; Therefore it is considered that the said Robert Hunter recover against the said John Bermingham his damages aforesaid, by the jury aforesaid in manner and form assessed, and also four pounds and thirteen shillings for his costs and charges aforesaid to the said Robert by the court of our lord the king now here adjudged of increase, with his assent; which said damages in whole amount to sixty-four pounds sixteen shillings and sixpence, and the said John Bermingham is in mercy.

§ 15. **American practice: Formal record of judgment.** The English practice is followed to a great extent in some states; but the entries are usually required to be made by the clerk of the court instead of by the attorney, in books instead of on loose sheets, and on paper instead of parchment. Probably no court in this country has its records kept in parchment. The statutes, court rules, and decisions of each state must be examined in order to learn the proper practice there; but it may be worth while to make a few suggestions as to the practice generally. In New York the successful party must make a judgment roll for the clerk, by preparing exact copies of all the papers on file in the case and attaching them together, or by attaching the original papers together, and in either event adding a copy of the judgment as entered in the judgment book, and filing the whole with the clerk; or the clerk may at his option make up the record himself (2a). So, in Minnesota and the Dakotas, except that it is the duty of the clerk to make up the roll (3). So, in Wisconsin, unless the party shall furnish the roll to the clerk. In California the rule is the same, except that the clerk makes up the roll by attaching together the original summons, proof of service, pleadings, a copy of the verdict, the bill of exceptions if any has been filed, and a copy of the judgment as entered in the judgment book (3a). In each of these states the statutes also require the clerk to enter the judgment at large in a book called the judgment book, and it is a copy of this entry that completes the

(2a) Knapp v. Roche, 82 N. Y. 366.
(3) Locke v. Hubbard, 9 S. Dak. 364.
(3a) Cal. Code Civ. Proc. (1895), § 670.

judgment roll. In each of these states, also, the clerk is required to keep an index of judgments, usually called the judgment docket, or the judgment and execution docket, in which he enters the names of the parties to the judgment, its date and amount, and whatever is done toward executing or satisfying it.

§ 16. **Same: Journal entries and files.** In Illinois, Indiana, Iowa, and Ohio, the practice is more like the practice in Michigan, which more nearly resembles the primitive than the modern English practice (4). No formal record is made up at all, but the files in the case and the entries made by the clerk, in the journal of the proceedings of the court while in session, stand in the place of the formal record. According to this practice, the files in the case are treated as a part of the record; and such action taken by the court in the case as does not appear from an inspection of the files, is shown by the journal. But in these states the clerk is required to keep an index or indexes, as in the other states, called a docket, and showing the names of the parties to each judgment, its amount, its date, and what has been done in the way of enforcing it or satisfying it.

§ 17. **Same: Example.** A fair idea of the character of the journal entries will be obtained by examining the following:

JOURNAL ENTRIES IN MICHIGAN CIRCUIT COURT.

Monday, May 7th, A. D. 1900.

At a regular session of the Circuit Court for the county of Washtenaw, commenced and held at the court house in the city of Ann Arbor, on the

(4) Jasper v. Schlessinger (per Moran, J.), 22 Ill. App. 637; Galbraith v. Sidner, 28 Ind. 142; Campbell v. Ayres, 6 Iowa, 339; Brown v. Barngrover, 82 Iowa, 204; Emery v. Whitwell, 6 Mich. 474, 486.

seventh day of May in the year of our Lord one thousand nine hundred, 1900.

Present, the Hon. E. D. Kinne,
Circuit Judge.

The court opened for business in due form at ten a. m.

[Here follow several entries concerning criminal cases, then the following.]

Ella Glazier
v.
The City of Ypsilanti.

In this cause, the parties being in court by their respective attorneys ready for trial, thereupon came a jury of twelve good and lawful men, to wit, Michael P. Alber, John Volz, Theodore Mohrbox, George Chapman, George Greske, Robert Campbell, Burt Martin, Ray Buckalew, Frank Gilpen, William Dolan, Gottlob Hutzel, and August Otto, who, being duly impaneled and sworn well and truly to try the issue between the parties, sat together and heard the allegations and proofs of the parties until the hour of adjournment,

Whereupon the Court adjourned till tomorrow at nine a. m.

[Signed] E. D. Kinne, Circuit Judge.

Tuesday, May 8th, A. D. 1900.

Court met pursuant to adjournment and opened for business in due form at nine a. m.

Ella Glazier
v.
The City of Ypsilanti.

The jury heretofore impaneled and sworn in this cause sat together and heard further proofs, the arguments of the attorneys for the respective parties and the charge of the court, and retired from the bar under the charge of Charles Dwyer, an officer of the court duly sworn for that purpose, to consider their verdict; and, after being absent for a time, returned into court, and say upon their oaths that the city of Ypsilanti is guilty in manner and form as the plaintiff has in her declaration in this cause complained against it; and they assess the damages of the said Ella Glazier on occasion of the premises, over and above her costs and charges by her about her suit in this behalf expended, at the sum of six hundred dollars; therefore, on motion of A. J. Sawyer & Son, attorneys for said plaintiff, it is considered and adjudged by the court now here that Ella Glazier do recover against the said city of Ypsilanti the said sum of six hundred dollars, together with her costs and charges to be taxed, and that execution do issue therefor.

[Here follow the entry in the next case and the other proceedings for the day, signed at the end by the judge as on the previous day.]

§ 18. **Same: Justice court records.** What is above stated has reference only to records in the superior courts. Justices of the peace usually have what is called a docket in which they enter, under the caption of each case, in ledger form rather than in the form of a journal, a minute of whatever is done in the case, from the issuing of the original process to the return of satisfaction on the execution.

§ 19. **Entering and amending record.** The record should be an accurate contemporaneous history of the proceedings, showing all the essential facts. But failure of the clerk to make up the record during the term does not deprive him of power nor relieve him from the duty to make it up later. The court may, of its own motion, order the record made, even after years of neglect. When the entries have been made the clerk's powers cease. No man would be safe if the clerk could change the records to suit his convenience. If he learns that his version of the proceedings does not accord with the facts, he cannot rectify his error; but the court may at any time order any part of the entries to be so changed as to accord with what was done. For this purpose, notice to the parties is not jurisdictional; though it ought always to be given, to enable them to show any reason why the change should not be made; and a party prejudiced by the omission may have the amending order vacated for that reason. The court should not rashly conclude that the entry is inaccurate; and many courts hold that no change can be made on the unsupported recollection of the judge and spectators, but only when the fact appears on the face of

some of the papers in the case. This makes the clerk more powerful than the court. On the other hand, it is said that the trial court is the only judge of the competency and sufficiency of the evidence to prove the fact. Yet, should not a court of review compel the correction of an indisputably erroneous statement in the record? The right to a day in court is nothing without the right to have the proceeding correctly recorded (5).

§ 20. **Questions regarding essentials of record.** What is a sufficient record is a question that may arise: (1) in the same proceeding; or, (2) in another proceeding, (a) in the same court, or (b) in some other court. If in the same court, though in another proceeding, want of record evidence of any essential facts can usually cause little trouble, provided you can convince the judge that these facts existed; for he may then order the objection removed on the spot, by amending the record so as to supply the defect (6).

§ 21. **How far presumptions aid the record.** But if the question arises in another court, the result is likely to be more serious. In such cases it is material to inquire whether the court in which the judgment was rendered was one of special and limited jurisdiction, or one of general jurisdiction; and, if the latter, whether the particular proceeding came within its general powers, or was some extraordinary statutory proceeding, of which it had juris-

(5) For authorities on the matters in this subsection see: Balch v. Shaw, 7 Cush. 282; Hughes v. Streeter, 24 Ill. 647; Commonwealth v. Magee, 8 Pa. St. 240. Justices of the peace have been held not to possess the power to change their records or add to them when once entered. King v. Bates, 80 Mich. 367, and cases cited.

(6) Dewey v. Peeler, 161 Mass. 135.

diction by virtue of the statute. If the court was a superior court of general jurisdiction, and the proceeding in question was within the scope of its general powers, there is a presumption that all the facts existed to give it jurisdiction of the matter and of the parties, and such facts need not be shown by the record. But if what was done to obtain jurisdiction is stated in the record, there is no presumption that anything else was done, though essential to obtain jurisdiction (7). The rule is different with respect to courts of special and limited jurisdiction, and with courts of general jurisdiction acting under an extraordinary statutory authority. In such cases, according to most courts, there is no presumption of law in favor of their jurisdictions. The jurisdictional facts must then affirmatively appear from sufficient evidence or proper averments in the record, or the judgment will be deemed void (8).

§ 22. **What must always appear.** But besides the above, all of the following must always appear: 1. That what is offered was really intended as a record by the court whose judgment it records. 2. Who were the parties in whose favor and the parties against whom the judgment was rendered. 3. That judgment was rendered, and what that judgment was; if for damages, how much; if for property, what property. No particular form of words is ever necessary. It is well enough if the substance can be gathered from the record as a whole. It need not show the names of the jury, the form of the

(7) Hahn v. Kelly, 34 Cal. 391, 405.
(8) Galpin v. Page, 18 Wall. 350, 366.

action, or the evidence on which the judgment was based; and need not be signed by the judge, unless the statute requires it (9).

§ 23. Conclusiveness of record: Early doctrine. "The rolls," said Lord Coke, "being the records or memorials of the judges of the courts of record, import in them such uncontrollable credit and verity, as they admit no averment, plea, or proof to the contrary. . . . And the reason thereof is apparent; for otherwise there should never be any end of controversies, which should be inconvenient. . . . During the term wherein any judicial act is done, the record remaineth in the breast of the judges of the court, and in their remembrance, and therefore the roll is alterable during that term, as the judges shall direct. But when the term is passed, then the record is in the roll, and admitteth no alteration, averment, or proof to the contrary" (10).

§ 24. Same: Modern limitations. This doctrine is necessary that there may be an end of disputes. But when applied in its pristine rigor to all cases and under all conditions, it was too harsh and unreasonable to stand. It would be hard to say exactly how much of it remains. The modern decisions upon it are very numerous, and far from uniform; yet the following propositions may be stated as settled beyond dispute (11):

1. Statements in the record may always be disputed in all proceedings instituted for the purpose of proving

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(9) 11 Ency. Pl. & Pr. 925, ff.

(10) Coke Lit., p. 260. See also, 3 Bl. Com. 407.

(11) See Black, Judgments, §§ 288, 289, 335, 416-19; Michaels v. Stork, 52 Mich. 260.

the falsity of the record, to the end that it may be so amended as truly to state the facts, or that the proceeding may be declared void or limited in its effect, because some essential facts alleged did not exist.

2. Statements in the record may be disputed, and always might be, in actions by the party injured against the officer making the false entry to recover the damages resulting from his wrongful act.

3. Strangers to the proceeding are not concluded by statements of fact made in the record so far as their interests are affected. But even against strangers the judgment record is competent and often the only competent evidence as to the facts occurring in court which the judgment should record, as, that judgment was rendered, and what that judgment was.

4. In actions on foreign judgments, the defendant may show that the judgment is void because some jurisdictional fact alleged in the record did not exist.

§ 25. **Doctrine does not apply to inferior courts.** Perhaps all has been said that can be stated with assurance. There is a fundamental distinction made in this connection between superior courts and inferior courts. We have seen that there is a presumption in favor of the jurisdiction of superior courts, though the facts are not stated, and that there is no such presumption with regard to the jurisdiction of inferior courts. As to the latter, most courts hold that extrinsic evidence cannot be admitted to prove that to have been done as to which the record is silent; but there are decisions the other way. Yet, if all jurisdictional facts are alleged, and it appears

from the record that those facts were tried and judicially found, that finding cannot be collaterally contradicted (12).

§ 26. Records of superior domestic courts conclusive on collateral attack. When the records of the judgments of superior domestic courts do not state the existence of jurisdictional facts, nor state what was done to obtain jurisdiction, some courts hold that the existence of such facts may be denied and disproved collaterally to impeach the judgment; but the weight of authority seems to be the other way. There is perhaps but one state, New York, in which it is held that the record of the judgment of a superior court may be impeached collaterally by contradicting and disproving the statements in the record. This rule is generally enforced, though it be alleged that the record was fraudulently made up to appear as if jurisdiction had been obtained (13).

Section 3. Vacating, Amending, and Modifying Judgments.

§ 27. Record and judgment distinguished. It seems superfluous to remark that under this head we are not discussing amendments of the record, a topic given considerable attention when we were speaking of the record. But amendments of the record and amendments of the judgment are often treated together in the most confusing manner by writers on this subject; and it is frequently

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(12) King v. Bates, 80 Mich. 367 (cases) ; Black on Judgments, §§ 282, 287.

(13) Freeman on Judgments § 133; Hahn v. Kelly, 34 Cal. 391; Ferguson v. Crawford, 70 N. Y. 253; Haven v. Owen, 121 Mich. 51.

impossible to tell from the reports of decisions whether the amendment under consideration was an amendment of the record or an amendment of the judgment. The judgment is the sentence of the law, the record its written history. The two are entirely distinct, and the rules concerning amendments of them are very different. Therefore, be it remembered that we are now concerned only with vacating and modifying the judgment.

§ 28. What courts may vacate, modify, and amend judgments. 1. Justices of the peace and similar inferior courts are generally held to possess no power to modify judgments they have rendered, except in so far as that power is conferred upon them by express statute. They cannot open their judgments, grant new trials, or even set aside verdicts rendered by their juries.

2. Only the court that rendered the judgment can modify or vacate it. The judge cannot do it during vacation. A court to which it has been taken by transcript cannot overhaul it. The legislature cannot by statute vacate it, for that is judicial action. Courts of supervision and review may reverse or annul judgments of lower courts, on appeal, error, certiorari, and the like; but that is an entirely different matter.

3. All superior courts of general jurisdiction possess the power to vacate, open, or modify their judgments on proper and seasonable application, unless forbidden by statute. This power was conceded at common law to all

the superior courts. It exists independently of any statute (14).

§ 29. **Such action during the term.** Until the final judgment has been rendered the court may, on the application of anyone interested or even of its own motion, modify or undo anything it has done in the cause at the same or any previous term. Until the end of the term at which the final judgment is rendered, the judgment is said to be in the breast of the court, and the power above mentioned continues unabated, though a new trial has already been denied and a bill of exceptions settled. Moreover, the term lasts till the first day of the succeeding term unless the court sooner adjourns sine die (15).

§ 30. **Common law remedies after the term.** But if the courts were permitted to keep causes within their power indefinitely, alternately changing from one side to the other, the remedy might be more intolerable than the wrong for which redress was sought. The interests of society demand that somewhere there should be an end of the controversy. Accordingly, the rule of the common law was that the cause passed beyond the power of the court with the ending of the term in which the final judgment was rendered, unless some proceeding to set aside the judgment had been commenced within that term and remained undisposed of. After that time the only recourse was by commencing a new action (16): (1) of

(14) For the matters in this subsection see 12 Ency. Pl. & Pr. 738; Black on Judgments §§ 297, 298; Nelson v. Guffey, 131 Pa. St. 289; Kemp v. Cook, 18 Md. 130; Bronson v. Schulten, 104 U. S. 410.

(15) Huber Mfg. Co. v. Sweny, 57 Ohio St. 169; Jansen v. Grimshaw, 125 Ill. 468; Jasper v. Schlessinger, 22 Ill. App. 637.

(16) All of the following actions are discussed in 3 Bl. Com. 402-411.

attaint, for relief against a false verdict; (2) of deceit, for relief against fraud in real actions; (3) of error, to remove the cause to a court of review to correct errors of law appearing on the face of its record; (4) of error coram nobis if the cause was in the king's bench, of error coram vobis if in the common pleas, by which errors of fact affecting the validity of the proceeding (such as that the defendant was insane, an infant, feme covert, or died before judgment) might be brought to the attention of the court that rendered the judgment, which would thereupon give relief; (5) of audita querela, to have the benefit of matter in discharge arising after judgment, or existing before and kept from the attention of the court by fraud of the other party; or, (6) by bill for review in chancery, by which the extraordinary powers of the chancery were invoked to obtain relief from an unjust judgment suffered by reason of excusable mistake of fact, accident, or fraud.

§ 31. **Modern practice as to relief after the term.** Such is the law to this day, except that in modern practice the relief obtained in all these numerous old actions is very generally granted on a simple motion in the court that rendered the judgment; and some further relaxations, the limits of which are not always clearly defined, have been introduced by statutes and custom differing in each state.

Section 4. Effect of Judgments.

§ 32. **In general.** Judgments have effect principally in two particulars: (1) in estopping; and, (2) in creating liens on property. The effect of judgments in creating liens is considered in the following article in this volume,

upon Attachment, Garnishment, and Execution, Chapter V, with the kindred liens created by those proceedings. The effect of judgments in creating estoppels we shall consider now.

§ 33. **Why judgments estop.** *Res judicata* (a thing adjudicated) is the name usually given to the branch of the law we are now discussing. The rule that a judgment shall estop is one of necessity. Any other rule would render all trials mere mockery, and all disputes endless. As soon as any judgment had been rendered, a new action might be commenced to try the questions again, or to determine whether the first decision was correct, and so on ad infinitum. The repose of society and the security of every individual require that what has been definitely determined by a competent tribunal shall be accepted as indisputable. Therefore, res judicata may render that white which was black, and that straight which was crooked. Being a rule of necessity, it must be very ancient; but we find it first fully and formally stated in the Duchess of Kingston's Case (17). Concerning the propositions announced in the opinion in that case, a recent writer on the subject says: "For one hundred and nineteen years [since 1776] they have stood the test, and been copied with approval by every supreme court in the English-speaking world, and by every author who has treated upon the subject" (18).

The following are the propositions referred to in the above comment: "What has been said at the bar is cer-

(17) 2 Smith's Leading Cases, 424.
(18) Van Fleet's Former Adjudications, p. 4.

tainly true, as a general principle, that a transaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjust to bind any person who could not be admitted to make a defense, or to examine witnesses, or to appeal from a judgment he might think erroneous. . . . From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: first, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive, between the same parties, upon the same matter, directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court, for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment."

§ 34. **Essentials of estoppel by judgment.** There is an estoppel by judgment only: (1) (a) as to the cause of action and (b) the issues tried; (2) in a suit between the same parties, or to which they were privy, or in rem; and, (3) when the judgment is upon the merits, final, valid, and subsisting. There is no estoppel if *any* of these three requirements be wanting. Our consideration of this topic will therefore consist of a review of these three essentials, in the order named.

§ 35. What matters are res judicata. Two distinct kinds of questions are res judicata: (1) the cause of action sued on and the defenses to it, the defendant's counterclaims and the defenses to them; and, (2) all matters directly in issue and necessarily decided, provided the court deciding would have had jurisdiction to decide them in the connection in which they were afterwards presented as res judicata. The distinction between these is thus stated by Mr. Justice Field: "There is a difference between the effect of the judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim, or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose. . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict *was* rendered." He then proceeds to say that in the latter class of cases, "the inquiry must always be as to the point *actually* litigated and determined in the original action,

not what *might have been* thus litigated and determined" (19).

We shall now consider these two classes of matters in the order above named.

§ 36. **Causes of action and defenses which are barred.** Whether contested or not, a final judgment on the merits, by a court having jurisdiction: (1) extinguishes the whole cause of action sued on, by declaring that it does not exist or by making it over into a judgment; and, likewise, (2) extinguishes all counterclaims set up, by denying or allowing them; and, (3) extinguishes all defenses to all claims and counterclaims, by declaring that they do not exist or by making them into a judgment. Therefore, no demand set up by the plaintiff in his complaint, or by the defendant in his counterclaim, and prosecuted to judgment, and no defense to any claim or counterclaim, whether the defense was presented or not, can be taken into account in any other action between the same parties while that judgment stands. If the demand or counterclaim was denied, it cannot be considered again, because the judgment proves that it is unfounded. If it was allowed in part only, it cannot be considered again, because the judgment proves the remainder unfounded. As to the part allowed, or the whole if all was allowed, that cannot be considered again, because it has been made into a judgment in his favor, or allowed as a payment on the demand against him. He asked that this be done. If a farmer requests a miller to grind his wheat and accepts the ground product, he should not then ask for the return of

(19) Cromwell v. County of Sac, 94 U. S. 351.

his wheat also, and it would do him no good if he did. The situation is much the same in the case under consideration.

§ 37. **Application of doctrine of merger.** The doctrine of merger has often been discussed by courts and text-writers in this connection. There can be merger only into something greater. The smaller cannot contain the larger. Applying these principles, it has been held in England that a debt on a bond was not extinguished by judgment being recovered thereon in a court not of record; and that execution might issue on a judgment in the king's bench after judgment recovered thereon in the common pleas (20). In other words, it was held that the judgment extinguishes only what is inferior to itself. On the same theory, a few American courts have held a judgment not to be extinguished by another judgment being recovered thereon (21). But the majority of the American courts hold that the new judgment destroys the old, though rendered by a court of another state (22). Yet, there can be no merger, for the two are equal. Some have said the original cause is extinguished, because allowing a new suit would encourage useless litigation, vexatious to the defendant and without benefit to the plaintiff. It is generally admitted that the plaintiff may sue on his judgment at once if not paid, and again on his new judgment, and so on as often and as many times as he wishes

(20) Higgens's Case, 6 Coke Rep. 44b, 45a, b; Preston v. Perton, Cro. Eliz. 817.

(21) Mumford v. Stocker, 1 Cowen, 178.

(22) Price v. First Nat. Bank, 62 Kan. 735; Gould v. Hayden, 63 Ind. 443.

(23). Mr. Freeman suggests that to allow a judgment to remain and be enforced by execution after another judgment had been recovered on it, might enable a vast amount of property to be seized, sold, and absorbed in costs, on one small demand, to the ruin of the defendant (24). Yet, where it is held that the creditor may have as many judgments as he will, it is agreed that he can have but one satisfaction. That the claim has passed in rem judicatam (become a thing adjudicated) furnishes a sufficient reason in every case where the cause of action or defense is held to be barred, and no other reason will always answer; which convinces one that the only true foundation in every case is res judicata.

§ 38. **Only cause of action sued on and defenses to it are extinguished.** Therefore: (1) other persons' causes of action are not extinguished; (2) the plaintiff's other causes of action are not extinguished; and we may add a further qualification, (3) certain incidents of the plaintiff's cause of action remain. Of these in their order.

1. The rights of other persons are not extinguished by the judgment. Their rights are not in issue, cannot be tried; and it would not be just to cut them off without a trial. From this it necessarily follows that when the defendants are principal and surety they remain so as between themselves after judgment as before (25); if they were tortfeasers, and therefore not entitled to contribu-

(23) In a recent Texas case it was held that where no advantage can accrue to the creditor by the new suit and judgment the action is not maintainable. Stevens v. Stone, 94 Texas, 415.

(24) Freeman on Judgments § 216.

(25) Fairchild v. Lynch, 99 N. Y. 359.

tion from each other, they are not entitled to contribution afterwards (26). So, where a person sues or is sued in two capacities, a recovery by or against him in one capacity will not bar a recovery in the other (27).

2. The plaintiff's other causes of action are not extinguished. To determine whether the cause of action sued on and the one on which judgment was formerly recovered are the same, often involves the perplexing question of separable and inseparable causes of action. We cannot go into the question here, otherwise than to say that only one judgment can be recovered for the one cause of action. The plaintiff cannot split up his demand. If he sues and recovers for a part his right to the remainder is gone. But, on the other hand, the plaintiff may have several causes of action against the same debtor, and suit and recovery upon one does not extinguish the right to sue and recover upon the others (28). Where a right of action is joint and several by the original agreement, or is made so by statute, suit and recovery of judgment against one does not bar the future action against the others. So, too, when a mortgage or a note of a third party is given as security for a debt, judgment against the third party on the note, or a decree foreclosing the mortgage, does not extinguish the debt (29). Likewise, taking judgment against a garnishee does not extinguish the principal judgment (30).

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(26) Percy v. Clary, 32 Md. 245.
(27) Loftis v. Marshall, 134 Cal. 394.
(28) Reilly v. Sicilian Asph. Pav. Co., 170 N. Y. 40.
(29) Burnheimer v. Hart, 27 Iowa, 19.
(30) Brice v. Carr, 13 Iowa, 599.

3. Certain incidents of the plaintiff's original demand remain incidents of the judgment. In many cases courts will look behind the judgment to discover on what it is based, to the end that it may be correctly interpreted. For example, if the debt sued on was the purchase price of a homestead, the homestead would not be exempt from execution on the judgment, and generally the taking of judgment on a debt does not release the security for that debt (31). If judgment is recovered on that judgment, the lien and right of priority belonging to the old belongs to the new judgment (32).

§ 39. **What matters aside from claims, counterclaims, and defenses are concluded.** Having determined what causes of action, counterclaims, and defenses are barred by the judgment, we now ask: Upon what matters does the judgment conclude the parties in another action upon a *different* claim? The answer to this question is thus given by Judge Van Fleet in his recent treatise (33) on this subject: "From the numerous conflicting decisions, I have deduced what seems to me to be the correct principles, and give them for what they are worth. . . .

"Among other things, it was said in the Duchess of Kingston's Case that the judgment of a court of concurrent jurisdiction, 'directly upon the point,' was conclusive upon the same matter directly in question in another court; but that the judgment of no court was evidence of any matter which came 'collaterally in question.'

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(31) White v. Simpson, 107 Ala. 386; Ford v. Harrison, 69 Ark. 205.
(32) Springs v. Pharr, 131 N. C. 191.
(33) Van Fleet's Former Adjudications, p. 27.

The principle involved in these two rules seems quite plain, nevertheless the cases differ in their application. Much of the difficulty arises, as it seems to me, from confusing the words, 'point,' 'matter,' and 'question,' with the word 'issue.' A suit may involve but a single issue, and yet the points, matters, and questions of law and fact, which tend to sustain its affirmative or negative, may be numerous. It is the affirmative or negative of this issue which the respective parties bend all their energies to sustain, and which is the matter 'directly' under consideration; while the evidence introduced, and the subsidiary questions of law and fact which they seek to establish in order to determine the issue in controversy, are matters 'collaterally in question,' which do not become things adjudicated. For instance, in a contest over a will, in which the sole issue is soundness or unsoundness of mind, there may be a hundred matters of controversy, and the jury may be required to determine that many questions by answers to special interrogatories; nevertheless, all these questions are merely collateral, and cannot be used as evidence between the same parties in another cause." The pleadings, court's opinion, and even parol proof may be given in evidence to show what points were decided in the former trial (34).

It was said in the Duchess of Kingston's Case that "neither the judgment of a concurrent nor exclusive jurisdiction is evidence . . . of any matter to be inferred by argument from the judgment." This statement means that the judgment is not evidence of any matter in issue,

(34) Cromwell v. Sac County, 94 U. S. 351.

which probably was, but might or might not have been, the true ground of recovery (35).

§ 40. **Parties bound by judgments: Judgments in rem and in personam.** Having considered at some length the matters to which the estoppel relates, we come now to consider what persons are estopped. In this connection, it becomes important to distinguish between judgments in rem and judgments in personam, and between the cause of action and the issues decided, as already explained. Judgments *in personam* are those establishing or denying claims or obligations of persons. Judgments *in rem* are those fixing the status of things. The same judgment may be in rem and in personam. Thus, when a person contests the probate of a will and it is received for probate, the judgment is in personam and in rem as to him, and it is in rem as to all who did not become parties to the proceedings. He is bound as to the issues decided, and also as to the cause of action. Those who did not become parties are bound only as to the cause of action. As to the matters decided, a judgment in rem concludes no one but those who became parties, and as to them it is a judgment in personam also. But as to the cause of action, which in such cases is always to fix the status of the thing, it binds everyone in the world if it be in rem generally; or if it be in rem as to certain persons, such as attachments without personal service or appearance, it binds them and their privies. With this much to distinguish proceedings in rem, let us see who are bound by judgments in personam.

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(35) Kitson v. Farwell, 132 Ill. 327.

§ 41. In what suits judgments bind parties and privies.

1. A judgment neither binds nor benefits strangers. Strangers are not bound, because they have had no day in court. A judgment never binds parties in their actions with strangers, because it would be unjust that anyone should bind another by a trial in which he himself was not exposed to the peril of being equally bound if the judgment had been the other way.

2. For the same reason, there is no estoppel between the parties themselves unless both are bound by the judgment, as the defendant would not be in cases of attachment without service or appearance. The estoppel must be mutual.

3. Parties to an action who were not adversaries are not bound to each other by the judgment therein. A judgment in favor of A, against B and C, is not res judicata between B and C, because their rights were not in issue and could not be tried.

4. A party is not estopped or benefited by an earlier judgment in which he sued the other party or was sued by him in a different capacity.

5. There is a difference of opinion as to whether judgments operate as res judicata in subsequent actions between the same parties on one side and some of the parties on the other. But the majority of the courts favor applying the estoppel.

6. A similar difference of opinion exists where new parties are added on either side. As to the cause of action, the party claiming it would seem to be estopped, because it is barred by or changed into the judgment, and

the strangers could not object. But as to the issues tried, the new party is not bound, and why should the opposite party be (36)?

§ 42. **Who are parties.** Judgments and decrees are conclusive only between parties and privies thereto. According to Greenleaf, "those are held to be parties who have a right to control the proceedings, to make defense, to produce and cross-examine witnesses, and to appeal from the decision if appeal lies" (37). This statement may be agreed to, if it be understood that the persons mentioned have been brought into court by due service of process, have voluntarily entered appearance, or are actually present and participating in the proceedings, in person or by attorney. The record will usually show who the parties were; but a party suing, sued, prosecuting, or defending, by a wrong name or in the name of another, is as much estopped by the judgment as if he had been named in the record; and parol evidence is competent to show his connection with the proceedings (38). But the person in whose name the action was brought is not bound by the judgment, if he had not the rights of control above mentioned.

§ 43. **Who are privies.** If a person is bound by a judgment, as a privy to one of the parties, it is because he has succeeded to some right, title, or interest of that party in the subject matter of the litigation, and not because

(36) For the above propositions, see Freeman on Judgments, §§ 154, 156, 158-61; Leggott v. Great N. Ry. Co., 1 Q. B. Div. 599.

(37) 1 Greenleaf on Evidence, § 535; Ruff v. Ruff, 85 Pa. St. 333.

(38) Black on Judgments §§ 537-541; Cromwell v. County of Sac, 94 U. S. 351.

there is privity of blood, law, or representation between them, although privity of the latter sort may also exist. It must also be remembered that privies are not, as such, estopped as to the issues tried, beyond controversies affecting their estate in the subject of the action or acquired from one of the parties after judgment in the former case. In order to create this relationship two requisites must exist. In the first place, the person who is to be thus connected with the judgment must be one who claims an interest in the subject affected, *through* or *under* one of the parties. In the second place, privies, in such sense that they are bound by the judgment, are those who acquired their interest in the subject matter *after* the commencement of the action; if their title or interest attached before that time, they are not bound unless made parties. He who takes title through a party while a suit is pending concerning the property, takes it subject to the judgment that may thereafter be rendered in that suit (39). But neither a party nor a privy is estopped by the judgment from setting up a title acquired from a stranger too late to be tried in the action (40).

§ 44. **Judgment essential.** A verdict does not estop. There must be judgment. Action may be maintained and judgment recovered, notwithstanding a prior verdict found in another action between the same parties on the same demand, whether that verdict sustained or denied the claim, and the issues tried are still open to dis-

(39) Freeman on Judgments § 162.
(40) Freeman on Judgments § 329.

pute (41). In England it is held that the creditor who has recovered judgment in another country may sue on the original demand or on the judgment at his option. But in Louisiana the original demand was held to be extinguished by the judgment in a foreign country (42); and the rule is always applied in the United States as to judgments rendered in one of the states (43). Thus, when a debtor had some property in New Hampshire and some in New York, but not enough in either place to satisfy the whole claim, it was held, that, by suing and taking judgment in New York while his action was pending in New Hampshire, the creditor barred the further prosecution of his original action in New Hampshire (44). In England and America, it is now settled that a foreign judgment sustaining or denying the claim is conclusive as to the validity and amount of the demand (45); and it should, therefore, be held to bar a new recovery on the original demand. The same reasons which make foreign judgments conclusive as to the cause of action make them conclusive as to the issues decided.

§ 45. **Effect of special jurisdiction of court.** If the court had not jurisdiction of the particular case before it, its judgment is of no effect for any purpose, as we have seen. But if the court had jurisdiction, a judgment of a justice of the peace, though rendered in another

(41) Black on Judgments § 682; Lehmann v. Farwell, 95 Wis. 185; Dougherty v. Lehigh Coal Co., 202 Pa. St. 635.

(42) Jones v. Jamison, 15 La. Ann. 35.

(43) Gray v. Richmond Co., 167 N. Y. 348.

(44) Child v. Eureka Powder Works, 45 N. Hamp. 547.

(45) Hilton v. Guyot, 159 U. S. 113.

state (46), is as binding concerning the cause of action as the judgment of a court of last resort would be, and it matters not that it is erroneous. What has just been said has reference to the cause of action. The rule as to the effect of a judgment as an estoppel concerning the issues decided is different. In this respect there is a distinction made, depending on the scope of the jurisdiction of the court rendering the judgment. In the Duchess of Kingston's Case (note 17, above) it is said to turn on the jurisdiction being *exclusive* or *concurrent.* As to this Judge Van Fleet says: "But I do not think the exclusiveness was of any moment. It seems to me that it was the completeness of the jurisdiction which gave conclusive force to the adjudication in other courts. In other words, if the jurisdiction had been concurrent in several courts, as frequently happens in America, the adjudication would have been none the less conclusive. If an issue is directly made in any court which has complete jurisdiction to determine it, the adjudication is conclusive in all other judicial proceedings. . . . The correct principle involved, in my opinion, in the phrase 'court of concurrent jurisdiction,' was first formulated by a Britsh court sitting in India, as follows: 'In order to make the decision of any court final and conclusive in another, it must be a decision of a court which would have had jurisdiction over the matter in the subsequent suit in which the first decision is given in evidence as conclusive.' . . . Thus, if the same instrument purports to convey a horse and a tract of land, and the purchaser, relying upon it

(46) Ault v. Zehering, 38 Ind. 429.

as his sole evidence of title, replevies the horse before a justice of the peace, that officer must determine its validity. But his determination cannot be used as evidence in a contest over the real estate over which he had no jurisdiction'' (47).

§ 46. **Judgment must be final, on merits, and subsisting.** The same reasons which require that the verdict should not, by itself, be regarded as conclusive, are equally applicable to interlocutory judgments and decrees. Moreover, the court that rendered them may modify them at any time, and they should not be more conclusive in other courts (48). Such orders do not bar another recovery for the same cause, and do not estop as to the issues decided (49).

The estoppel of a judgment is confined to those matters actually decided. Therefore, a judgment for the defendant, because the court had no jurisdiction to hear the complaint or grant relief, or because plaintiff misconceived his action, or has not brought in the proper parties, or has not set the cause forth in proper form, or has sued prematurely, will not prevent his prosecuting a new action in a competent court, on a sufficient complaint, against the proper parties, for the same cause, after it has matured. But as to the matters actually decided by such final judgment, the parties are as much bound as by any other judgment (50).

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(47) Van Fleet's Former Adjudication, 29, 30, 31. Compare: Hibshman v. Dulleban, 4 Watts (Pa.) 182.

(48) Duchess of Kingston's Case, 2 Smith's Leading Cases, 424.

(49) Black on Judgments § 509, 695.

(50) Freeman on Judgments §§ 260-269.

If the judgment is set aside or in any way annulled, the cause of action on which it was rendered comes to life again, the same as if no judgment had ever been rendered (51). But no such effect is produced by merely staying the enforcement of it, or taking an appeal from it, or moving for a new trial (52). In most states the parties are held to be estopped as to the issues decided, though an appeal be pending.

§ 47. **Judgment must be in personam.** A judgment by which the defendant is not bound does not merge the cause of action. For example, if judgment be recovered in attachment without personal service, though the attached property is bound by the judgment, the defendant is not; and, for any balance remaining unpaid by the proceeds of the attached property, the creditor may maintain an action on the original demand (53). Likewise, judgments rendered against all the debtors when only part of them are served, which is permitted by statute in several states, does not extinguish the demands sued on, for those not served are not bound by the judgment; and afterward the creditor may sue the others or all on the original cause of action (54). Yet, if only a part are sued when all might have been, the judgment against them extinguishes the cause of action, and the plaintiff cannot hold the others afterward (55). As to the issues tried, we have already

(51) Goodrich v. Bodurtha, 6 Gray, 323; Fries v. Pa. Ry. Co., 98 Pa. St. 142.

(52) Cloud v. Wiley, 29 Ark. 80; Young v. Brehe, 19 Nev. 379.

(53) National Bank v. Peabody, 55 Vt. 492.

(54) Mason v. Eldred, 6 Wall. 231.

(55) Freeman on Judgments §§ 231, 232.

seen (§§ 40-41) that there is no estoppel in any action merely in rem, because the estoppel must be mutual, and, as those who do not become parties are not estopped, they cannot set up the estoppel against those who have become parties.

§ 48. **Satisfaction of judgment and subsequent rights.** These topics are treated in the next article, upon Attachment, Garnishment, and Execution, Chapter VI, in this volume.

ATTACHMENTS, GARNISHMENTS AND EXECUTIONS

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CHAPTER I.

NATURE OF THE PROCESSES.

§ 1. What judgments need no execution. The judgment has been said to be the end of the law in regard to the controversy; and such it is, whenever it declares the existing status to be the just one. So, too, where the judgment or decree is self-executing, which is whenever the thing awarded is not capable of manual delivery. For example, a process to take an office from one man and give it to another would be a troublesome thing to execute. The sheriff could hardly convince the one party that he had received or the other that he had been disrobed of it. But in most cases the judgment would

amount to nothing if the law did not provide means of putting it into effect.

§ 2. **Enforcement by coercion.** Satisfaction of judgments and decrees may be enforced: (1) by coercing him against whom the judgment or decree is pronounced till he satisfies it; (2) by an officer putting the judgment into effect under the direction of the court. The coercion may consist of imprisoning the defendant, or seizing and holding his property, or both. At one time, this means of enforcement was available on every judgment at law, and was the only means of enforcing decrees of the court of chancery. Now, we have statutes rendering decrees enforceable in any way that a similar judgment might be enforced; and corcion is not now available to enforce satisfaction of any judgment for the payment of money merely, except in certain cases specified in the statute, and usually is confined to judgments for torts, frauds, or misconduct in office. But this is the usual method of enforcing the final orders at law in the extraordinary actions—mandamus, procedendo, prohibition, habeas corpus, etc. (See Extraordinary Remedies in Vol. IX). *Attachment* is the generic term applied to all writs designed to coerce obedience or punish for contempt; and this was the only sense in which the word was used by the courts, until the modern practice was introduced of seizing property belonging to the defendant and holding it to furnish a fund for the satisfaction of a judgment yet to be rendered.

§ 3. **Execution by officer under process of court.** All the judgments in the ordinary actions at law which need

putting into effect may be executed by the court's officer, without attempting to coerce the defendant to satisfy them. The judgments in these actions which may require execution are: (1) for a sum in money, as in assumpsit; (2) for a specific chattel, as in replevin; (3) for a specific parcel of land, as in ejectment; (4) for any combination of these, as when in replevin judgment for defendant is given for costs in money, for the return of the specific chattel, and, if the chattel cannot be had, then for a specified equivalent in money. The execution which may issue upon any judgment will depend upon the class to which the judgment belongs, for the execution must correspond to the judgment to be enforced.

§ 4. **Execution** is the act of putting something into effect. Every process issued with a view of putting a judgment into effect may properly be termed an execution. Even attachment, garnishment, replevin, and other writs designed to provide in advance for the satisfaction of the judgment, are, in one sense, only anticipatory executions. All of these are sufficiently embraced in the definition of an execution as the command of the law made by the court in writing, solemnly directing the judgment to be put into effect, and usually specifying the method of proceeding with greater or less certainty. The following are some of the principal writs partaking of the nature of an execution.

§ 5. **Replevin,** a common law action, demands mention here, because its original process is in effect an execution, commanding the officer to make immediate restitution to the plaintiff and at the same time to summon the defend-

ant to answer the plaintiff in court. Here we have the relief granted first, and the right to it tried afterward. This was the only common law action in which relief was given before judgment.

§ 6. **Attachment,** in its most comprehensive sense as a legal term, means: (1) the act of taking the body or effects of any person into custody and so holding the same to abide the further orders of the court; or, (2) any process commanding such acts to be done. Any process commanding the taking of the body is called a *capias.* The most common attachment of this kind is the *capias ad respondendum,* commanding the officer to arrest and detain the defendant till he enters appearance in the action with bond to satisfy whatever judgment may be recovered therein. At the present time the most common attachment is the one commanding the officer to seize property of the defendant to a specified amount and hold it, the purpose being to order it sold when judgment is rendered, and to apply the proceeds in satisfaction of the judgment.

§ 7. **Garnishment** consists of notifying someone to retain something he has belonging to the defendant, to make disclosure before the court concerning it, and to dispose of it as the court shall direct. A person so summoned is called a *garnishee.* The proceeding has been likened to a subpœna to a witness, in that it is a summons to give testimony in an action between others upon being paid the mileage and fees of a witness. In another aspect it has been seen to resemble an injunction against disposing of property, the disobedience of which is a

contempt of court for which the garnishee may be punished (1). Again, it may be compared to an order appointing a receiver; for, when served, the property in his possession is in the custody of the law, and the garnishee is merely the hand of the court, even as a sheriff holding property under an attachment or an execution (2). The garnishing creditor discerns in it only an attachment or execution ancillary to his action or to enforce his judgment. He sees in the garnishee an officer of the court holding the property under his writ, for which he is seeking to compel the garnishee to account. But the garnishee sees in it an action against him by his creditor for the benefit of his creditor's creditor—an action commenced by filing a sworn complaint (the garnishment affidavit), issuing and serving a summons to appear and defend, liable to be followed by a judgment for default if he does not plead within the prescribed time, likely to result in issue being joined and trial demanded if he appears and denies the complaint, which action, despite his stoutest defense, may lead to a judgment against him, enforceable by seizing and selling any of his property not exempt from execution, as any other judgment would be. These partial resemblances remind us of Saxe's Hindoo tale of the four blind men and the elephant, and show how unlike anything but itself garnishment is. Under some statutes, garnishments issue ancillary to an execution; under others, ancillary to an attachment; under others, independently, as a form of attachment if before

(1) Lilienthal v. Wallach, 37 Fed. Rep. 241.
(2) Stiles v. Davis, 1 Black, 101.

judgment, as a form of execution if after judgment. The statutes of each state show in which of these forms they authorize the proceeding.

§ 8. **Fieri facias (fi. fa.)** is an execution commanding the sheriff, or other officer addressed, to seize and sell enough of the defendant's property to satisfy a judgment therein specified with the amount, and to bring the proceeds into court. This is one of the oldest, and to this day one of the most common of all writs of execution. At the common law, only goods and chattels could be taken and sold under this writ (3); but in this country since 1732 (4), the fee or any other legal estate in lands may be seized and sold under a fieri facias against the owner. In some states, the land can be sold only in case there is a bid for it at the sale equal to a certain per cent of the value fixed by the appraisers at the time of the levy, and in others it can be levied on only in case sufficient chattels liable to execution cannot be found.

§ 9. **Capias ad satisfaciendum (ca. sa.)** is an execution commanding the officer to arrest and imprison the defendant till the judgment against him is satisfied.

§ 10. **Levari facias** was an execution allowed by the common law, to be issued by a superior or an inferior court, commanding the sheriff to seize the defendant's property and hold it till the judgment was satisfied. Under this writ the sheriff could seize all the defendant's goods, and take the rents and profits of his lands; but he

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(3) Harbert's Case, 3 Coke 11b. Blackstone says a term for years could be sold as a chattel under a fi. fa. at the common law. 3 Bl. Com. 417.

(4) Statute 5 Geo. II, Cap. 7, § 4.

could not sell or apply the property to a satisfaction of the judgment, and the possession of the land itself could not be taken. This writ is very little used in America (5).

§ 11. **Extendi facias** was an execution allowed upon recognizances in certain cases. Under this writ the body, goods, and all the lands of the debtor could be taken (6).

§ 12. **Elegit** was an execution taking its name and origin from the statute of Westminister 2d, c. 18, 13 Edw. I (1285), which provides that when a debt is recovered or acknowledged in the king's court, or damages awarded, the creditor may elect to have a fieri facias or a writ commanding the sheriff to deliver to him all the chattels of the debtor and half of his land. Under this writ the chattels were appraised and delivered to the creditor as a payment on the debt, and the land was appraised and half of it delivered for such a term as would be necessary to get the balance of the judgment from the rent at the appraised value. The creditor so in possession was called the *tenant by elegit.* Though no land could be found, the chattels could not be sold under this writ but must be appraised and delivered in payment. This writ is still in use in some of the eastern states.

§ 13. **Habere facias seisinam,** or writ of seisin of a freehold, and **habere facias possessionem,** or writ of possession of a term, were executions by which the sheriff of the county where the land lay was commanded to put the

(5) 3 Bl. Com. 417; Freeman on Executions § 6.
(6) 3 Bl. Com. 420.

plaintiff into actual seisin or possession of the land awarded by the judgment.

§ 14. **Retorno habendo** was an execution on a judgment in favor of the defendant in replevin, and by it the sheriff was commanded to return the replevied chattels.

It is scarcely profitable to review the old writs further, since the general name execution covers all, and a writ appropriate to the judgment to be enforced will be issued in every case.

CHAPTER II.

ISSUANCE OF PROCESS.

§ 15. Plan of treatment. Having reviewed briefly the nature of the processes by which judgments are enforced, we come now to consider the questions which arise in issuing the processes; and we shall take them up in the order in which they would arise in the prosecution of the suit; but the arrangement of the questions must be somewhat arbitrary, because issuing the process is but one transaction, and such questions as are presented arise substantially at the same time. Attachments, garnishments and the numerous forms of execution may conveniently be treated together, although there are some matters peculiar to each, which will have to be specified from time to time as we proceed. But no one can fail soon to discover that most of the rules stated apply to all processes alike, and that to restate them as to each would be worse than useless repetition, for in that way the true scope of the rules would not be shown.

The principal questions which can arise in issuing processes to enforce judgment are the following: (1) when process is issued; (2) on what demands the processes may be issued; (3) at what stage of the case the processes may be issued; (4) the effect of the use of one process on the right to use another; (5) who may demand

and control the issuance of the processes; (6) against whom the processes may be issued; (7) what courts may issue the processes; (8) the form and essentials of the affidavits, writs, and other papers. Each of these questions will be taken up in the order named.

§ 16. **When process is issued.** It is issuing the process that gives it life and effect. Writing, signing, and sealing it are only preliminary acts. It is so issued as to give it effect as an issued process only when it has been put into the custody of the officer who is to execute it (1). Indeed, it is not then issued, if it is accompanied by orders not to execute till some later time (2).

SECTION 1. DEMANDS ON WHICH PROCESS MAY ISSUE.

§ 17. **Executions.** In England executions might issue on recognizances in certain cases; and in America we often find statutes providing, that, on certain bonds filed in judicial proceedings, executions may issue at once upon breach of the condition of the bond. But the general rule is that execution can be issued only on a final, subsisting judgment (3). But, on the other hand, execution may be issued on any final, subsisting judgment, as a matter of course, though not expressly awarded by the judgment, or even though some other means of getting satisfaction be specified (4).

§ 18. **Attachments and garnishments: Limitations.** Attachments and garnishments, because unknown to the common law, may be issued only in cases falling within

(1) Gowan v. Fountain, 50 Minn. 264.
(2) Smallcomb v. Cross, 1 L. Raym. 251.
(3) Locke v. Hubbard, 9 S. Dak. 364.
(4) Roberts v. Connellee, 71 Tex. 11.

the terms of the statutes authorizing these proceedings. From this fact arise three important limitations upon the use of these processes: (1) as to the form of action in which they may be issued; (2) as to the character of the obligation to enforce which they may be issued; (3) as to the grounds or exigencies which most statutes require to exist before these processes, more particularly attachment, can be issued. Of these in the order named.

§ 19. **Form of action.** Wherever the code provides for but one form of action, and abolishes the old forms, this consideration is entirely eliminated. This is true in a majority of our states today. In the states where there are several forms of actions, it is important to observe that attachment and garnishment are available only in such as the statutes permit.

§ 20. **Character of obligation.** The most general limitation observed in the statutes is that they do not extend the use of these processes to actions brought to recover specific property. Such proceedings might be useful in such actions, when judgment is allowed for the value in case the property itself cannot be found, and to secure the costs in other cases, but otherwise they are not adapted to the purpose of such actions. Next to this, the most general limitation is that the statutes do not make the processes available in actions to recover damages arising from torts; but in a few states they are allowed in such actions generally, or for certain specified torts. The statutes in most states provide for attachments in certain cases to secure debts not yet due. These provisions extend only to absolute present debts payable at a future

day. From what has been said it will be seen that the statutes generally extend the use of attachment and garnishment only to actions on contracts, judgments, and decrees. By interpretation, most courts have further limited the scope of the use of attachment, as distinguished from garnishment, by holding that the debt sued for must be: (1) liquidated or capable of being liquidated by some standard known to the law or specified in the contract (5); and, (2) approximately ascertained when the action is commenced (6). But a few courts hold that uncertainty in the amount of the demand is no objection to allowing the use of attachment (7).

§ 21. **Grounds or exigencies of issue.** Some ground beyond the fact of an unpaid demand must exist to authorize an attachment under most statutes; but the statutes differ from each other considerably in enumerating what shall be sufficient grounds. Yet, all the grounds usually specified indicate, in one way or another, that the plaintiff would not be very likely to get satisfaction by prosecuting an ordinary action; (1) because the defendant is removing from the state, is now a non-resident, or is a foreign corporation, for which reason he could seldom or never be found within reach of a summons, and, if served would not be likely to have property permanently within reach of execution sufficient to satisfy the judgment; (2) because his character is such that it is reasonable to suppose he would defy execution by putting all of his property beyond reach before judgment could be recovered;

(5) Wilson v. Louis Cook Mfg. Co., 88 N. Car. 5.
(6) Hawes v. Clements, 64 Wis. 152.
(7) See Wilson v. Louis Cook Mfg. Co., 88 N. Car. 5.

which dishonest character is shown: (a) by his having fraudulently incurred the obligation sued on; (b) by his having absconded or concealed himself to avoid the service of process upon him; or, (c) by his having assigned, concealed, or carried away his property, or a part of it, to get it beyond the reach of his creditors, or having threatened, prepared, or attempted to do so.

The rules to be deduced from the decisions upon these statutory provisions fall naturally into two groups: (1) those which show what constitutes removing, non-residence, fraudulently incurring the obligation, absconding, concealing, disposing of property to defraud, etc.; (2) those which apply alike to all the grounds for attachments. The matters coming within the first class are too numerous, minute, and local to be considered in so elementary a treatise as this (8).

§ 22. **Rules applicable to all grounds for attachment.** The principal rules applicable to all the grounds alike may be roughly formulated as follows:

1. An attachment obtained on one ground cannot be sustained on another, though the other would have been an equally good ground for issuing it (9).

2. When an attachment is obtained on several grounds it is sustained by the existence of any of those grounds.

3. When an attachment is obtained on several grounds, and one of those grounds exists only as to part of the demands sued on, and the other grounds alleged exist

(8) For these decisions see: Attachment, §§ 54-121, Vol. 5, Century Digest, 251-326; Attachment, 3 Am. & Eng. Ency. L. (2d ed.) 195-206.

(9) Botsford v. Simmons, 32 Mich. 357.

only as to the remainder, the attachment will be sustained as to all.

4. When the alleged grounds for attachment exist only as to a part of the demand sued on, the whole attachment will usually be dismissed; but this would not be done if the improper item was included by mistake, nor because more was claimed than proved to be due, provided there was no fraud intended (10).

5. When there are several defendants, an attachment of the property of all cannot be sustained without an alleged ground for attachment existing as to all; but it seems unnecessary that the same ground should exist as to all. For example, the attachment might be sustained as to one on the ground that he was a non-resident, as to the others on the ground that they had absconded (11).

6. The fact that a ground for attachment exists as to one, and not as to the others, will not enable the creditor to sue him alone unless the obligation is joint and several. But, according to the decisions in several courts, the property of that one may be attached in a suit against all (11).

7. Whatever be the ground for the attachment, it must be substantially made out. While the courts are inclined at the present time to construe the attachment statutes liberally to advance the remedy, they will not stretch the words of the statute to include cases which the legislature did not intend to include (12).

(10) Meyer v. Evans, 27 Neb. 367.
(11) Wiley v. Sledge, 8 Ga. 532.
(12) Jackson v. Burke, 51 Tenn. (4 Heisk.) 610.

Section 2. At What Stage of Case Process May Be Issued.

§ 23. **Garnishments.** Garnishments need not be separately considered; for where they are issued as attachments or ancillary to attachments they may be issued as early and as late as other attachments, and when they are issued as executions or ancillary to executions they may be issued as early and as late as other executions.

§ 24. **Attachments.** Attachments are usually allowed by the statutes to be issued at the commencement of the action, or at any time before judgment. For this purpose the action is commenced as soon as the declaration or complaint is filed and before the summons has been served or issued (13). After judgment there is no occasion for issuing an attachment, because every object it could serve would be as well served by issuing and levying an execution; but, if an attachment should be issued after judgment, it would be sustained as a special execution, provided it contained the essentials of an execution (14). In the absence of statute providing for reviving attachments and garnishments upon death of the defendant, they are abated by his death before judgment, but not by his death after judgment (15).

§ 25. **Executions: Before recording or while stayed.** Executions issued before judgment is rendered are void, not voidable; and judgment subsequently rendered will not make them valid. Some statutes say that as soon as

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(13) Hargan v. Burch, 8 Iowa, 309.
(14) Pracht v. Pister, 30 Kan. 568.
(15) Drake on Attachment, § 422; Rood on Garnishment, § 381.

the judgment is recorded, execution may issue; and several courts have held that executions issued under such statutes before the record is made are absolutely void (16), unless the court orders the entry made nunc pro tunc; but, according to other decisions, they are only voidable, and generally the plaintiff is entitled to execution as soon as he is entitled to payment, which is the moment the judgment is rendered. Reasoning by analogy from the decisions on kindred questions, the better rule would seem to be that executions issued after judgment rendered, but before recording it, contrary to statute, are only voidable, liable to be quashed on motion. For example, there is almost no dispute but that an execution is merely irregular, and not void, by reason of being issued while execution is stayed by statute, agreement of the parties, or order of court (17).

§ 26. **Same: After judgment becomes dormant.** At common law, execution should not issue more than a year and a day after the judgment was rendered, without first reviving the judgment by scire facias; and now, though the time is considerably extended by statute, it is usually provided that after the specified time execution shall not issue without special order of the court upon hearing after notice to the defendant. Yet an execution issued after the year and a day at common law, or after the time specified in the statute, without scire facias or other appropriate proceeding, was never held to be void, but only liable to be set aside on the defendant's motion. He

(16) Locke v. Hubbard, 9 S. Dak. 364.
(17) Bacon v. Cropsey, 7 N. Y. 195.

could not attack it collaterally, and no one else could object at all (18).

§ 27. **Same: After judgment outlawed.** An execution issued on a judgment which is outlawed so that action could not be maintained on it, is generally held to be void, and the purchaser at the sale thereunder acquires no title (19). But when the execution was issued before the judgment was outlawed, and the sale was advertised and made afterwards, the title of the purchaser was held to be good (20).

§ 28. **Same: After judgment satisfied.** There is some conflict in the decisions, but the decided weight of authority is to the effect that an execution issued after the judgment is satisfied, or even a sale after the judgment is satisfied on an execution issued before, passes no title, even though the satisfaction had not been entered on the record, and the purchaser paid full value without notice (21).

§ 29. **Same: After death of a party.** At common law, execution issued after the death of a sole plaintiff was irregular, unless he was only the nominal plaintiff, or the judgment had been sold during his life, or revived on scire facias after his death; and a few courts have held such executions void. But the judgment did not have to be revived because of the death of one of several plaintiffs; and even the death of a sole plaintiff after execu-

(18) Mariner v. Coon, 16 Wis. 465.
(19) Freeman on Executions, § 27a.
(20) Lundeman v. Hirth, 96 Mich. 17.
(21) Wills v. Chandler, 2 Fed. Rep. 273.

tion issued did not abate it (22). If the sole defendant dies before the lien attaches, the execution is generally held to be too late, but the writ is not abated by his death after the lien attaches (23); and the death of one of several defendants is generally held not to prevent issuing executions against all afterward, and levying them upon the property of the survivors without first reviving the judgment.

Section 3. Effect of Use of One Process on Right to Another.

§ 30. **Whether a levy is satisfaction.** A creditor who has sued out any execution or attachment may omit to execute it, and, before it is returned or returnable, take out a capias (ad respondendum or ad satisfaciendum) and arrest the defendant thereon. But after the property has been taken under the other writ, he cannot have or use a capias till the other is completely executed and returned (24). There are many decisions and text-books in which this doctrine is stated in round terms as applying to all forms of writs. It was once said that a mere levy is a satisfaction. That doctrine was completely exploded by Judge Cowen in Green v. Burke (25), yet one often sees the statement that a levy is prima facie a satisfaction, which is equally false. All that is meant by these expressions is that the creditor will not be permitted to harass the debtor, after having levied on enough property to make his debt secure. Decisions are abundant in which defenses to attachments,

(22) Clerk v. Withers, 1 Salk. 322.
(23) People v. Bradley, 17 Ill. 485.
(24) Miller v. Parnell, 6 Taunton, 370.
(25) 23 Wend. 490.

on the ground that they were issued and levied while other property was held under other attachments for the same debt, have been denied. Again, there are plenty of decisions denying similar objections to levies under executions, while property was held under other executions on the same judgment. And it is admitted by all courts that the issuing and use of several similar executions on the same judgment, at the same time, may and should be allowed by the court wherever the ends of justice require it. Though these were issued without special order by the court, the sales under them would probably not be held void, but only voidable. Yet there are some decisions holding sales absolutely void, when made after property had been seized under a previous writ, and released by plaintiff's orders without the consent of the defendant (26).

§ 31. Second execution on attachment judgment. Whether there may be more than one execution issued on a judgment rendered in an attachment proceeding, in which the defendant was not personally served and did not appear, is a point on which opposing decisions have been rendered, in the absence of any statute directing that such second execution may issue; and it is believed that no such special statute will be found in any state. In an Illinois case (27), the supreme court of the state said that, by the return of the first execution unsatisfied, the attachment proceeding and the possession of the attached property were in effect abandoned; and that no further process could issue.

(26) For full discussion see Green v. Burke, 23 Wend. 490.

(27) Keeley Brewing Co. v. Carr, 198 Ill. 492.

In a Minnesota case (28) it was also held that the sale on an alias execution issued in such a case passed no title, because by ordering the return of the first the plaintiff had abandoned the proceeding, though the first was returned because the plaintiff thought that the election of a new sheriff had left his old writ unexecutable, but the court held that the new sheriff should have made the sale on the old writ, which is peculiar.

But in a Montana case (29) it was held that the return of the attachment after levy, with an indorsement thereon that no property could be found other than that attached, and the subsequent issuance and levy of an execution, were not an abandonment of the attachment and the lien thereon, and that the attaching creditor might then maintain a bill in equity to have an assignment of the attached property declared fraudulent and void.

Section 4. Who May Demand and Control Process.

§ 32. **Every person owning a claim.** It is only justice that all men should be equal before the law. Every judgment creditor may have his judgment enforced by execution, if the nature of the judgment warrants it. Anyone may employ attachment and garnishment to secure the payment of his claim, unless excluded by the plain terms of the statute or by his own acts. The United States, any state, a corporation, or an assignee of the demand, may employ attachment or garnishment, though it or he and the defendant are both non-residents, and the

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(28) Butler v. White, 25 Minn. 432.

(29) Merchant's Bank v. Greenwood, 16 Mont. 395, 448. See also Van Camp v. Searle, 147 N. Y. 150, 162.

non-residence of the defendant is the ground for the attachment (30).

§ 33. **Only persons interested in claim.** The owner of the demand, and he only, has a right to have it enforced, and to control the means of enforcement (31). If he is absolute owner he has the sole right to control. If there are several part owners, the rights of all will be protected, respect being given to the wish of the majority. If one has a paramount lien without owning the legal title, that will be protected. Thus, when an execution on A's judgment against B was levied by the sheriff on B's judgment against C, which the statute allowed, and thereafter, with notice of the levy, C paid B, and B entered satisfaction on his judgment record—this did not defeat A's lien, but the court set aside the satisfaction and ordered execution to be issued on B's judgment, so that the sheriff could collect it to satisfy A's judgment (32). Officers of court have no lien on the judgment for the amount of their unpaid fees; and, therefore, the sheriff cannot proceed on the writ in his hands to collect his fees after the parties have settled (33), nor refuse to accept the plaintiff's bid at the sale because the plaintiff would not pay his fees. Those having this right to control will be protected by the court against its officers, the plaintiff of record, and all persons presuming to interfere.

§ 34. **Writs issued on others' orders are valid.** Yet an

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(30) Attachment §§ 43-45, Century Digest.
(31) Daugherty v. Moon, 59 Tex. 307.
(32) Henry v. Traynor, 42 Minn. 234.
(33) Wills v. Chandler, 2 Fed. Rep. 273.

execution issued in the name of the judgment creditor without his consent is not void. It will protect an officer acting without notice of the want of authority to issue it, and will pass title to the purchaser (34).

§ 35. **Remedies of persons injured.** Nevertheless, the plaintiff may have the execution set aside even after sale to an innocent purchaser, unless the full price bid has been paid. If the clerk refuses to issue process on the owner's demand, or the sheriff refuses to obey his orders in executing it, he may sue for damages on the offending officer's official bond, move the court to amerce him till he obeys, and in many cases have mandamus to him from the higher courts (35).

§ 36. **Form of demand and proof of authority.** The person thus entitled to control the processes may do so in person, in opposition to his attorney of record, or he may act through an agent, whether such agent is an attorney or not. No particular form of demand is necessary; and failure to give proof of authority to command is no excuse to the officer for not acting, unless he demanded such proof; but officers have a right to demand reasonable proof of authority, before obeying one assuming to control (36).

SECTION 5. AGAINST WHOM PROCESS MAY ISSUE.

§ 37. **Parties only.** Execution can be issued only against the parties cast in the judgment; and attachment and garnishment can be directed only against the effects of the persons sued. The execution must conform to the

(34) Sowles v. Harvey, 20 Ind. 217.
(35) State v. Herod, 6 Blackf. (Ind.) 444.
(36) Daugherty v. Moon, 59 Tex. 307.

judgment to be enforced. The insertion into it of the names of persons as defendants, who are not such, would protect an innocent officer in seizing their property, but would not pass title to the purchaser, though the persons so named as defendants were equally liable with the real defendants for the payment of the debt represented by the judgment (37). For the same reason, the garnishee cannot be charged for his liability to a stranger, who is co-debtor with the defendant on the debt sued for, nor for what the garnishee owes to the plaintiff.

§ 38. **All defendants.** Every party cast in judgment is liable to execution. It matters not who he may be. If judgment may be recovered it may be enforced. Likewise, the effects of every person sued may be taken by attachment and garnishment. This applies to persons under legal disability, infants, lunatics, spendthrifts, and married women (38).

§ 39. **Any person may be garnishee.** The statutes usually provide that the plaintiff may have "any person" summoned as garnishee. These terms are generally held to include natural persons, corporations, non-residents, infants, lunatics, married women, and the plaintiff himself (39). Several courts have denied the plaintiff's right to charge a defendant as garnishee, on the ground that he gains no advantage thereby; but there is an advantage where the same person is sued in one capacity, and summoned as garnishee in another, and such garnish-

(37) Hamner v. Ballantyne, 13 Utah, 324.
(38) Dillon v. Burnham, 43 Kan. 77.
(39) Wilder v. Eldridge, 17 Vt. 226.

ments have been sustained in several cases (40). The statutes forbidding husband and wife to testify against each other embarrass attempts to charge one as the garnishee of the other.

§ 40. Limitations upon right to process. To the rules stated in the two preceding subsections, a limitation arises from the fact that the administration of public business cannot be diverted from its proper channels nor interrupted to advance the interests of any individual, and one department of the state cannot command and require obedience of another, except as authority to do so is given it by law. For this reason, courts cannot audit and compel payment of claims against the state, nor enforce their judgments when the legislature requests them to audit such claims, nor require the other departments of the state to answer before them as garnishees. For the same reason, one court cannot interrupt the business of any other court by requiring its officers to answer as garnishee for property held by them as such officers, nor by seizing the property in their possession. The same reason forbids the seizure of any property used by any governmental agency—city, county, town, or public board—in the performance of its public trust, and is generally held to prevent requiring such agencies to respond as garnishees for property in their possession belonging to the defendant, or debts they may owe him. Public service corporations—transportation companies, water companies, etc.—are generally held to come within the reason of this limitation, in so far that the property used by

(40) Brown v. Wiley, 107 Ga. 85.

them in the performance of their public trust cannot be seized on execution against them; and where the performance of their public duties would be interrupted thereby they cannot be required to answer as garnishees in suits against other persons.

Section 6. What Courts and Officers May Issue Process.

§ 41. Every court may enforce its judgments. It would be idle to adjudicate, if without power to enforce; therefore, authority to pronounce necessarily implies authority to execute (41). For example, a sale of land on an execution issued by a county court not expressly authorized to issue executions was sustained in the following language: "The act establishes a court of record, and in general terms confers upon it the powers and duties of a court of record. The power to issue executions is incident to such courts, unless denied, and no such denial is found in the act (42)." But a statute giving one court authority to issue a special process unknown to the common law does not impliedly authorize other courts to issue such processes.

§ 42. No court can issue process on judgments of other courts. Only the court in which the action is pending or which rendered the judgment can issue process to enforce it, unless the original record has been removed to some other court, or there is some statutory provision authorizing some other court to issue process to enforce it. Except in these cases, executions, attachments, and

(41) Kentzler v. Chicago, M. & St. P. Ry. Co., 47 Wis. 641.
(42) Bailey v. Winn, 101 Mo. 649, 659.

garnishments, issued from any other court would be void, and the sale thereunder would pass no title (43). Statutes providing that the filing of a transcript of a judgment of one court in the court of another county, or in another court in the same county, shall have the effect of creating a lien upon the defendant's property, or shall have some other effect, do not impliedly authorize the courts in which such transcripts are filed to issue executions thereon, and executions so issued are void (44). For the same reason, garnishments so issued would be void.

§ 43. **When process from other courts is authorized.** In cases of appeal, if the appeal has the effect of destroying the judgment appealed from, as is usually the case where appeal is taken from the judgment of a justice of the peace, no process can afterward be issued on that judgment by any court, but the court above issues execution on its own judgment when rendered. In other cases the judgment is not generally nullified by the appeal, and the court below issues the execution to enforce its judgment when it is affirmed, unless some statute gives the court above authority to do so, or unless the original record was sent up. Where statutes provide that execution may issue from a court in which a transcript of the judgment of another has been filed, it is generally held that the judgment does not become a judgment of the court where the transcript is filed, except for the purposes specified in the statute. When the transcript is taken

(43) Clarke v. Miller, 18 Barbour (N. Y.) 269.
(44) Bostwick v. Benedict, 4 S. Dak. 414.

from a justice court, it is generally held that the justice who rendered the judgment thereby loses authority to enforce it, revive it, or do anything further concerning it (45); and it seems that the same rule might well be applied where the transcript is taken from one superior court to another for the same purpose; but there are several decisions holding in such cases that, after the transcript has been sent, the court that rendered the judgment may set it aside, receive payment of it, issue another transcript to another county, or revive it on scire facias (46).

§ 44. **Only by the proper officer.** No process is valid unless issued by the officer authorized by law or by his direction; and in several cases process issued by the proper officer has been held absolutely void, because he thoughtlessly added to his signature some title in place of the name of his office, as when the clerk of the court was also justice of the peace and added that title instead of clerk (47). These decisions seem clearly wrong, on the ground that it is no worse than if he had not signed at all, a matter we shall presently consider (§§ 53-55). Officers are not usually allowed to act in their own cases; but it has been held that an attachment issued by a clerk in his own case, upon his presenting to himself his own affidavit for the same, was valid, because no one else could issue the writ, and the issuance of it was not judicial, but purely ministerial and without discretion (48). The

(45) Rahm v. Soper, 28 Kan. 529.
(46) Nelson v. Guffey, 131 Pa. St. 273.
(47) Perry v. Whipple, 38 Vt. 278.
(48) Evans v. Etheridge, 96 N. C. 42.

writ is generally held good though issued by a deputy not authorized by law or not duly appointed.

Section 7. Form and Essentials of Papers.

§ 45. Attachment and garnishment affidavits: Wanting or defective. Most of the statutes require an affidavit to certain matters to be filed before the attachment or garnishment shall be issued, and generally provide for the supplying of defects by amendment. If no affidavit is made, or only one so seriously defective that it cannot be amended, the attachment or garnishment must of course fall, when directly attacked for that reason by the defendant or garnishee; and fully half of the courts have held that the want of a sufficient affidavit may be set up by the defendant or any other person to avoid the proceeding collaterally. Others hold attachment and garnishment proceedings not open to collateral attack for want of the statutory affidavit (49).

§ 46. What is a sufficient affidavit: By and before whom sworn to. If the statute does not provide by whom it shall be made, the affidavit can be made by any one acting for the creditor and possessing personal knowledge of the facts; but if the statute requires it to be made by one, the affidavit of another will not do. So, too, the oath may be administered by any officer competent to administer oaths generally, unless the statute otherwise provides.

§ 47. When sworn to. It should be sworn to before the writ issues, and not so long before as to raise a presump-

(49) Cooper v. Reynolds, 10 Wall. 308.

tion that the facts have since changed. One sworn to the day before was held bad in Michigan (50).

§ 48. **Substance.** The averments should be so positive that perjury could be assigned on them, and disjunctive forms of statement avoided; but, with these limitations, it is always safest to follow the words of the statute rather than to choose phrases which seem equivalent to them; for the court may entertain a different opinion on that matter, and the statute is the sole requirement. The affidavit is not sufficient unless it shows every fact which the statute requires it to show; but, on the other hand, it is not defective because any other matter is not shown by it. For example, when the statute does not require these things, it need not show that it is made in behalf of the plaintiff, that suit has been commenced, how much is due, that anything is due, that the garnishee is a corporation, etc. (51).

§ 49. **Accuracy and certainty.** An allegation of one ground will not sustain an attachment or garnishment on another; an allegation of one debt will not sustain an attachment on another; one cannot be charged as garnishee on an affidavit alleging indebtedness by another, by him and others, or by him alone in another capacity. The affidavit must be sufficiently specific and accurate on these matters to identify the persons, obligations, etc.; but the same affidavit, containing all essential averments, will sustain an attachment and garnishment, or several garnishments.

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(50) Wilson v. Arnold, 5 Mich. 98.

(51) Burnham v. Doolittle, 14 Neb. 214.

§ 50. **Form.** The affidavit should be signed by the affiant, signed by the officer administering the oath; and, if made in a pending cause, it should be entitled in the court and cause. But errors in any of these respects are not generally held to be fatal if the essential facts appear from the papers as a whole or are otherwise shown (52).

JUSTICE COURT GARNISHMENT AFFIDAVIT IN MICHIGAN.

State of Michigan, County of Washtenaw, ss.

John Smith, agent for William Smith, being duly sworn, says that John Brown and William Brown are justly indebted to said Wm. Smith upon express and implied contract in the sum of ninety-four dollars, or thereabouts, and that for the recovery of said demand said John Smith has commenced suit before John Barnes, one of the justices of the peace in and for said county.

And this deponent further says, that he has good reason to believe and does believe, that the Michigan Central Railroad Company, a corporation under the laws of Michigan, is indebted to said John Brown and William Brown, and to each of them, and has property, money, and effects in its possession belonging to said John Brown and William Brown, and to each of them. JOHN SMITH.

Subscribed and sworn to before me
this 11th day of October, A. D. 1901.
JOHN BARNES, Justice of the Peace.

AFFIDAVIT FOR ATTACHMENT IN ILLINOIS CIRCUIT COURT.

State of Illinois, County of Cook, ss.

John Smith, being duly sworn, says that John Brown and William Brown are justly indebted to William Smith in a sum exceeding twenty dollars, to wit, the sum of two hundred and twenty-five dollars, after allowing all just credits and set-offs; and that the said indebtedness is due for goods sold and delivered. And this deponent further says, that said John Brown and William Brown are not residents of this state, and that upon diligent inquiry affiant has not been able to ascertain the place of residence of them or either of them. JOHN SMITH.

Subscribed and sworn to before me
this 14th day of October, A. D. 1901.
JULIUS REITZ, Notary Public.

§ 51. **Attachment bonds.** That the creditor shall file a bond before the writ issues is another requirement con-

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(52) Burnham v. Doolittle, 14 Neb. 214; Stout v. Folger, 34 Iowa, 71.

tained in most attachment statutes. This requirement is not usual in garnishment statutes, probably because garnishments do not interfere with the possession nor interrupt the use of the property as attachments do. The decisions upon the effect, in collateral attack, of the failure to give a bond when required, or such a one as is required, are as much in conflict as the decisions upon the kindred questions of affidavits wanting or defective (§ 45, above), and the reasons in both cases are the same. But the courts are agreed that failure to file a bond at the time, in the amount and terms, and executed by the persons required by the statute, is fatal on a direct attack by the debtor, unless the statute has provided a means of curing the defect. Even a deposit in court of the amount in money would not do (53).

§ 52. **Form and essentials of processes: Parts of process.** The parts of judicial processes—original, mesne, and final—are: (1) the *venue* (State of Michigan, Washtenaw county, ss.), which shows where the subject-matter and proceeding is located; (2) the *title as to the court* (In the circuit court for Washtenaw county), which shows what court is conducting the proceedings; (3) the *title as to the cause,* if issued in a cause already commenced (Ella Glazier v. City of Ypsilanti), which shows in what cause the process is issued; (4) the *style* (In the name of the People of the State of Michigan), which shows what authority gives the commands contained in the process; (5) the *address* (To the sheriff of Washtenaw county, Greeting), which shows to whom the commands contained

(53) Drake on Attachment § 115.

in the process are given; (6) the *body,* which should contain an explicit statement of what is commanded to be done, when it is to be done, and how; (7) the *teste* (Witness the Hon. E. D. Kinne, circuit judge, at the city of Ann Arbor, Washtenaw county, this 23d day of December, A. D. 1901), which once indicated the final approval of the process by the sovereign or his proper officer, together with the time and place when and where that approval was given; (8) the *clerk's signature* at the end (Jacob F. Schuh, clerk of said court, by John Clark, deputy); (9) the *seal of the court,* if it has a seal, impressed upon the process at the left of the clerk's signature, to prove that the process is genuine; and (10) *indorsements* such as are required by the statutes and court rules (e. g, A. J. Sawyer & Son, Ann Arbor, Mich., attorneys for plaintiff).

§ 53. **What formal parts are essential.** The venue and titles are usually omitted from many kinds of process, and probably the practice is not uniform as to giving or omitting them on any particular kind. Such matters can usually be settled in any state without much difficulty in any case, by consulting the forms used there. But a question of more serious character, and much harder to answer, is this: What is the effect of an omission of any part required by inveterate practice, the court rules, the statutes, or the constitution? The difficulty in answering this question consists in the fact that no distinction, as to the importance of the various required parts, or between the various kinds of processes, is agreed to; except that processes issued before judgment have to be passed upon by the court, and their validity or invalidity is made

res judicata by the judgment if the court had acquired jurisdiction. Almost any sort of proposition concerning almost any part of any process can be sustained by respectable authority, and refuted by authority equally respectable.

§ 54. **Same (continued).** Some may lightly answer that that is a small matter, depending upon the local practice. But is it a matter of practice merely? In direct attacks it may be conceded that substantial departures from prescribed form would be enough to avoid the proceedings. But how about collateral attacks? For example, when we come to look at the decisions, we find execution sales held void on collateral attack, because the writ was not sealed, as required; and the next minute we find a decision holding that the omission is not even ground for quashing the writ on direct attack (54). Similar illustrations might be given of almost any other part. One judge says: "If you may omit this part, you may omit that; if you may omit two parts, you may omit ten. And what is there left? Where will you draw the line, if not on the one side or on the other?" He puzzles us, and we cannot answer him. Another judge compares the process to a man, and asks if cutting off a foot would deprive a descendant of Adam of his title to manhood. How much may be cut away and the man still live? Delighted with this judge's wit and his evident love of justice, we willingly follow him anywhere, perhaps too far.

§ 55. **Same (continued).** In a recent treatise on this subject, the writer takes up separately the various parts

(54) Sidwell v. Schumacher, 99 Ill. 426; Lowe v. Morris, 13 Ga. 147.

of the process, except the body; and, after citing and commenting on several decisions on both sides as to that particular part, concludes in each case that the process should not be held void, but voidable at most, for want of that part. However, this writer does not bother himself to answer the question above suggested, as to whether a writ would be valid which contained none of these parts but the body (55). Probably the majority of the decisions upon each of these points agree with the conclusions reached by this writer. They more nearly accomplish the ends of justice, and seem to be correct, on the principle that the law favors substance rather than form, and will not deny substantial rights because of the misprison of a public officer.

§ 56. **Body of process: As a summons.** Attachment and garnishment writs serve two objects, or consist of two parts, the command to summon and the command to attach; but executions need usually contain no summons. The summons should accurately specify who is to be summoned, and when and where he is to appear; but mistakes in the name, or omissions of it, may be cured by amendment, whenever the mistake is discovered or objection made, and will not justify the party served in disregarding it. Statements of a past time or an improper time or place, and failure to state any time or place at all, are cured by appearance at the proper time and place without making objection; but will often cause the writ to be abated on proper objection at the first opportunity. The risk of its being valid is too great ever to

(55) See Alderson on Judicial Writs, §§ 14-42.

justify disregarding it. The writ may be bad as a summons and yet good as an attachment.

§ 57. **Same: As an attachment. Naming the parties.** The rules as to the essentials of the body of the execution are the same as those governing the attachment and garnishment writs in so far as these are merely attachments. In all of these cases the writ should clearly state in what action or on what judgment it is issued, whose property is to be taken, what kind of property, how much, and when return of the writ is due. Mistakes in the names, omission of some, or additions of others, will not, according to most decisions, make the writ void; but the facts may be shown by extrinsic evidence (56). Such mistakes will not even justify the officer in failing to execute it or excuse the garnishee for paying over the property in his hands, provided the officer in the one case, and the garnishee in the other, really knew who was meant, whether he learned that from the writ or otherwise. For the sake of conforming to the judgment, the execution should issue in favor of all the plaintiffs and against all the defendants, although only one plaintiff is interested, and part of the defendants are dead, discharged in bankruptcy, or not liable for any other reason.

§ 58. **Same: What? How much? When return?** Direction to take realty first, when the statute requires personalty to be first taken, is not generally held to make the writ void, but only erroneous. A failure to state how much is to be taken has been held to be a failure to command anything to be taken. justifying the officer in doing

(56) DeLoach v. Robbins, 102 Ala. 288.

nothing, and giving him no authority to do anything. The writ is not void because it requires too much or too little to be taken, and the officer is not justified in disobeying it (57) A decisive majority of the courts hold that failure to state when the writ shall be returnable, or making it returnable at an improper time, do not make it void, nor excuse the officer in failing to execute it (58).

FORMS.

EXECUTION FROM UNITED STATES CIRCUIT COURT FOR DISTRICT OF CALIFORNIA.

United States of America.

The President of the United States of America, to the Marshal of the District of California, Greeting: You are hereby commanded that of the goods and chattels of John Brown in your district, you cause to be made the sum of five thousand four hundred and twenty dollars to satisfy a judgment lately rendered in the Circuit Court of the United States for the District of California, against John Brown for the damages which John Smith has sustained, as well by reason of his damages as for the costs and charges in and about that suit expended, whereof the said John Brown stands convicted as appears of record. And if sufficient goods and chattels of the said John Brown cannot be found in your district, that then you cause the amount of said judgment to be made of the real estate, land, and tenements whereof the said John Brown was seized when said judgment was rendered, May 7th, 1901, or at any time afterwards, in whose hands soever the same may be. And have you that money, together with this writ, with your doings thereon, before the judges of the said Circuit Court, at the courthouse thereof, in the city and county of San Francisco and District of California, on the 18th day of December, A. D. 1901, to satisfy the judgment so rendered as aforesaid.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 10th day of October, A. D. 1901, and of our independence 125.

Attest my hand and the seal of said court, the day and year last above written.

WILLIAM MOORE, Clerk.

[Seal] by Joseph Frey, Deputy Clerk.

JUSTICE COURT GARNISHMENT SUMMONS IN MICHIGAN.

State of Michigan, County of Washtenaw, ss.

To any constable of said county, greeting: In the name of the People of the State of Michigan, you are hereby commanded to summon the

(57) DeLoach v. Robbins, 102 Ala. 288; Bacon v. Cropsey, 7 N. Y. 195.

(58) Freeman on Execution, § 44.

Michigan Central Railroad Company to appear before me, at my office, in the city of Ann Arbor, in said county, on the 18th day of October, A. D. 1901, at nine o'clock in the forenoon, to answer, under oath, all questions put to it touching its indebtedness to John Brown and William Brown, or either of them, and the property, money, and effects of the said John Brown and William Brown in its possession or control according to the allegations contained in the affidavit of John Smith duly made and filed in this suit. Hereof fail not, and have you then and there this precept.

Given under my hand at the city of Ann Arbor, in said county, this 11th day of October, A. D. 1901.

JOHN BARNES, Justice of the Peace.

ATTACHMENT AND GARNISHMENT SUMMONS IN ILLINOIS CIRCUIT COURT.

The People of the State of Illinois, to the Sheriff of Cook County, Greeting:

Whereas John Smith, as attorney for William Smith, hath complained that John Brown and William Brown are justly indebted to said William Smith in the amount of $225.00, and that the same is due for goods sold and delivered; that the said John Brown and William Brown are not residents of this state nor is their place of residence known; and the said William Smith having given bonds and security according to law: We therefore command you that you attach so much of the estate, real and personal, of the said John Brown and William Brown to be found in your county, as shall be of value sufficient to satisfy the said debt and costs, according to the complaint, and such estate so attached in your hands to secure, or so to provide, that the same may be liable to further proceedings thereupon, according to law; and that you summon John Brown and William Brown to appear and answer the complaint of the said William Smith, at a court to be holden at the court-house in the city of Chicago, in the county of Cook, upon the 14th day of November next; and that you also summon the First National Bank of Chicago, and such other persons as you shall be requested by the said William Smith, as garnishees, to be and appear at the said court on the said 14th day of November next, then and there to answer to what may be objected against them. When and where you shall make known to the said court how you have executed this writ, and have you then and there this writ.

Witness: John Young, clerk of the said court, October 14th, A. D. 1901.

[Seal] JOHN YOUNG, Clerk.

CHAPTER III.

GENERAL INCIDENTS AND REQUISITES OF EXECUTING PROCESS.

§ 59. **Plan of treatment.** Having completed our survey of the questions that arise concerning the issuance of the processes to enforce judgments, we come now to consider the questions that arise concerning the execution of those processes. Among these we may mention: (1) the legislature's power to change the remedy; (2) the power of the court and judge to control the processes; (3) the officer's rights and liabilities in executing the processes; (4) where the processes may run and be executed; (5) when the processes may be executed; (6) who may execute the processes; (7) for what garnishees may be charged; (8) what may be taken under attachments and executions; (9) what constitutes a valid levy and service; (10) the nature of the lien acquired by attachments, garnishments, judgments, and executions; (11) how that lien may be lost or become subordinate; (12) how it may be foreclosed. This order of arrangement of the questions is somewhat arbitrary, as was the arrangement of the questions arising concerning the issuance of the process. It is not possible to fix any exact order of sequence. But this arrangement brings up the questions as nearly in the order in which they would arise in practice as any;

and we shall now take up each of these matters separately in the order named in this and the two chapters following.

SECTION 1. ALTERATION AND CONTROL OF PROCESS.

§ 60. Power of legislature to change remedy. This and the following subsection have to do with both the issuing and the execution of the processes, and can be as well considered here as anywhere. The matter of procedure is entirely in the control of the legislature. It may make laws apply to pending proceedings, though the result be fatal to them. No vested right is acquired by reason of having commenced suit. No right to proceed in the particular form is acquired by reason of that form existing when the contract was made (1). The legislature may take away the remedy entirely, or modify it at will as to all future transactions; and remedies for torts may be modified and destroyed after the tort is committed, and even after the claim has been reduced to judgment (2). The state legislature cannot impair any remedy existing at the time the contract is made, so as to prevent its use for the enforcement of the judgment recovered on such contract, unless an equivalent is given. This is because the United States Constitution forbids the states to pass any law impairing the obligation of contracts. See Constitutional Law, §§ 232-35, in Volume XII.

§ 61. Judicial control of process. Every court has power, and is in duty bound, to recall its processes, set aside them and the proceedings of its officers under them, stay the proceedings, and otherwise control them, when-

(1) Heineman v. Schloss, 83 Mich. 153.
(2) Freeland v. Williams, 131 U. S. 405.

ever such action is necessary to prevent abuse, oppression, or injustice. This power is entirely independent of statute; it exists from the necessity of the case. Notice to the party should be given, but is not jurisdictional. The determination may be made summarily without the intervention of a jury. Probably the powers of the judge during vacation are more restricted; but he certainly could stay all further action till the matter could be determined in open court, and, for this purpose, may act of his own motion without giving any notice to the parties (3).

SECTION 2 RIGHTS AND LIABILITIES OF OFFICER.

§ 62. **Right to protection in general.** An officer has three means of protecting himself from liability for acts done in obeying the commands contained in the process he is called upon to execute: (1) the shield of the process; (2) recourse to the party whose process he serves; (3) the fact that his possession is the court's possession. Of these in the order named.

§ 63. **Shield of the process.** The officer is protected by process not absolutely void, whether regular or irregular; and he cannot take advantage of irregularities, though appearing on its face, to excuse his failure to obey it (4). Void process, never as a sword but always as a shield, protects the officer in executing it if it is fair on its face, unless he knows that it is void. Whether the court issuing it be of general or limited jurisdiction, he is not bound to look behind his writ (5). Indeed, there is con-

(3) Commonwealth v. Magee, 8 Pa. St. 240.
(4) People v. Dunning, 1 Wend. (N. Y.) 16.
(5) Keniston v. Little, 30 N. H. 318.

siderable respectable authority and excellent reason for saying that he should not attempt to decide the truth of statements made to him concerning it, but may and should leave those matters to be determined by the court (6). Yet he is not bound to execute any void process; and, if it is void on its face, he will not be protected in doing so. The court above may not agree with the court below as to its jurisdiction in the premises; but if the material facts appear, or are suggested, on the face of the process, the officer is bound at his peril, not merely to decide correctly all the questions of law presented, but to do what is impossible for other mortals—correctly forecast what will be the decision of the court of last resort upon them. If he refuses to proceed and the court finally holds the process valid he is liable to the plaintiff. If he acts as commanded by the process, and the court finally holds it void, even on the ground that the law under which it issued is unconstitutional, he is liable to the defendant. See Torts, § 98, Volume II of this work. It has been said that in this particular the law says to the officer: "You are condemned if you do, and you are damned if you don't." His only safeguard is to demand indemnity in advance. If the process is fair on its face, and commands the officer to take any specific thing, he is protected in doing it, no matter who owns it (7). But he is not justified in taking the property of one person, on a writ commanding him to take the property of another; nor in taking exempt property on a writ commanding

(6) Abercrombie v. Chandler, 9 Ala. 625.
(7) Buck v. Colbath, 3 Wall. 334.

him to take what is not exempt (8). These matters he must decide. If the process protects him at all, it shields him from liability for taking the person or property as commanded, and for breaking doors and going upon the property of the defendant or others when necessary to execute the command of the writ, except that he cannot break the outer door of the defendant's dwelling (9).

§ 64. **Recourse to party whose writ is served.** The officer may protect himself against loss of his fees, by insisting on receiving his pay in advance; but accepting the process without claiming the right waives it. Against liability for acting under a writ which may turn out to be void, or for taking property which may not be subject to the process, he may protect himself by refusing to act till a bond of indemnity is given him; and, even after a levy without indemnity, if the creditor refuses or neglects on demand to indemnify him against new claimants, he is justified in yielding to them, or to a junior creditor who does indemnify (10). But failure to execute cannot be defended on the ground that indemnity was not given, if none was demanded, nor because the indemnity given was worthless, if he accepted it as sufficient. Without any indemnity being given or promised, the officer has recourse to the creditor for reimbursement for all loss suffered by him by reason of taking property which the creditor expressly directed him to take, unless the officer was certain that the property was not liable to the process; in which case even an express promise to indem-

(8) Lammon v. Feusier, 111 U. S. 17.
(9) Burton v. Wilkinson, 18 Vt. 186; Bailey v. Wright, 39 Mich. 96.
(10) Smith v. Osgood, 46 N. H. 178.

nify would be void. A general direction to execute the process does not make the creditor liable for the trepasses of the officer in executing it, nor to indemnify the officer against liability therefor (11). Contracts to indemnify from liability for disobeying process are usually held to be void. But an action on such a bond was sustained in a recent case, in which attorneys advised the sheriff that the process was void, and the defendant induced him to accept the bond and wait, so that the validity of the process could be tried (12).

§ 65. **Officer's possession is the court's.** Whatever protection the officer receives from this fact is merely incidental to the protection of the court's jurisdiction. Property seized under process thereby passes into the custody of the court issuing the process, and can be taken from the officer only on another process commanding it and issuing from the same court. Though the owner is a stranger to the process, he cannot recover it in any other way. Nevertheless, this fact does not prevent him from recovering the value of the property in an action against the officer in any court otherwise competent to entertain the suit (13).

§ 66. **Property rights of officer.** Unless some statute otherwise provides, delivery of process to an officer to be executed does not, before levy, vest in him any title to or interest in any property which the process enables or directs him to take. His right and intention to levy upon it give him no right of action against anyone who injures,

(11) Nelson v. Cook, 17 Ill. 443.
(12) Ray v. McDevitt, 126 Mich. 417.
(13) Lammon v. Feusier, 111 U. S. 17.

destroys, or carries it away, even if done for the purpose of preventing a levy. The extent of his right is to seize it if he can get to it (14). But a levy gives him such a special interest in the chattels taken as to enable him to retake them in another state (15); or he may maintain replevin, case, trover, or trespass, as the facts and his interests may require, in his own name without adding his office, against his keeper if he fails to produce them on demand, against anyone who injures or takes them from him or his keeper, though he be a constable, and the taker a sheriff acting under a valid process (16). If the officer making the levy was a deputy he may sue in his own name, and the sheriff may also sue. Since the garnishee becomes a quasi-officer by virtue of the garnishment, he has similar rights against anyone who interferes with his possession or injures the property (17). A process fair on its face is not sufficient to sustain an action. The plaintiff must show a valid process and levy (18).

§ 67. **Liability of officer in general.** The officer is liable for his own wrongs, and for those of his deputies acting within the scope of their authority or in color of it. He is not liable for failure of himself or his deputy to do that which he could not have done by the exercise of due care and diligence, or which the law did not authorize him to do, or left in his discretion to do or not. But for

(14) Mulheisen v. Lane, 82 Ill. 117.

(15) Utley v. Smith, 7 Vt. 154.

(16) Brewster v. Vale, 20 N. J. L. 56; Phelps v. Gilchrist, 30 N. H. 171; Maguire v. Bolen, 94 Wis. 48.

(17) Erskine v. Staley, 38 Va. 406.

(18) Hammer v. Ballantyne, 13 Utah, 324.

malfeasance and misfeasance he is not excused by the fact that he acted in good faith, was only a de facto officer or was liable to a statutory penalty for the same act. For the wrong of the officer or his deputy, the person injured may sue the officer on his official bond, may sue him alone, or, for the deputy's misfeasance or malfeasance, may sue him alone; but for nonfeasance the deputy is liable only to his superior. The officer who commences executing a process must finish it, though his term of office expire in the meantime; therefore, if an officer is reelected, and during his second term becomes liable for the act or default of himself or deputy under a process received and partly executed during his first term, his bond for his first term is liable, and his bond for his second term is not (19). Only a person showing a direct duty to himself violated and a special injury proximately resulting therefrom can recover, and then only to the amount of the injury suffered.

The persons to whom liability may thus be incurred are: (1) the plaintiffs in the process; (2) the defendants in the process; (3) strangers to the process. Of these in the order named.

§ 68. Liability to plaintiff in process: Instances. 1. If process not absolutely void is presented to the officer to be executed, and he refuses or neglects to execute it during the time allowed by law therefor, the plaintiff may recover against him unless he shows a legal excuse for his default. 2. So, if he disobeys any legal instructions of the plaintiff in executing, whereby he fails

(19) Colyer v. Higgins, 62 Ky. 6.

to take the property, incurs expense, fails to realize as much at the sale as otherwise might have been obtained, etc. (20). 3. So, if he is not reasonably diligent in searching for property, or in levying upon it, by reason of which the process cannot be so effectively executed; for example, if the defendant has died in the meantime, sold the property, encumbered it, or suffered a levy by another (21). 4. So, if he does not take enough, when enough could have been found by the exercise of reasonable diligence. 5. So, if he allows the defendant to escape after arrest on a capias, unless caused by the act of God or the public enemy. 6. So, if he suffers a loss of or injury to the property attached which reasonable diligence could have prevented; and, in the case of property taken under execution, several courts have held that he would be excused by nothing short of the act of God, public enemy, or inevitable accident (22). 7. So, if he accepts an insufficient delivery bond from the opposite party, a claimant or other person, where the statute allows the recovery of the property on giving bond. 8. So, if he does not follow the law as to the manner of advertising and selling, or does not use due diligence to realize the best price. 9. So, if he makes a false return (23). 10. So, if he does not make return by the return day, though not specially ruled to do so (24). These are the cases in which liability is most frequently incurred; but he may become liable in other cases.

(20) Morgan v. People, 59 Ill. 58.
(21) Knox v. Webster, 18 Wis. 406.
(22) Hartleib v. McLane, 44 Pa. St. 510.
(23) Acton v. Knowles, 14 Ohio St. 18.
(24) Burk v. Campbell, 15 Johns. (N. Y.) 456.

§ 69. Same: **Measure of liability. Defenses.** The measure of the officer's liability in any of these cases is the amount that could have been realized by proper care and diligence, and it is no defense that any part or the whole can still be realized (25). The burden is on the officer to show that part or all and how much could not have been recovered. It is presumed that all might have been recovered. It is a good defense that the property pointed out was exempt or belonged to another. It is no defense that all the property pointed out by the plaintiff was levied on under his process, and that the remainder could not be found by the sheriff till pointed out by the junior creditor on whose writ it was sold (26). It is no defense that the deputy disobeyed the terms of his commission or the officer's orders. It is no defense that the officer omitted the levy or released the property, in deference to a senior process in the hands of another officer (27).

§ 70. **Liability to defendants in process.** An officer holding and executing valid process will become liable to an action by the defendants therein: (1) if the officer arrests or seizes beyond his territory; (2) on Sunday, after the return day, or, (3) contrary to the exemption laws; (4) if he breaks the outer door of the defendant's dwelling, or injures any other property by breaking into anything without demanding admission (28); (5) if he takes property from the defendant's person, for example, a watch or money in his pockets, or a pin on his tie,

(25) Ledyard v. Jones, 7 N. Y. 550.
(26) Knox v. Webster, 18 Wis. 406.
(27) Payne v. Drewe, 4 East, 523.
(28) Burton v. Wilkinson, 18 Vt. 186.

but not, it was held, for taking it out of his hand; (6) if he perpetrates a fraud to accomplish a levy, as by decoying the defendant into his territory, or arresting him on criminal process, or asking to see the watch in defendant's pocket and taking it when shown (29); (7) if he levies on other property after he has taken enough to satisfy the process beyond all question, or arrests without searching for goods when there is plenty of property to satisfy his writ, or takes realty when there is plenty of personalty which he should first take, or takes and sacrifices very valuable property when enough other was offered that he could have sold without such sacrifice; (8) if he works or uses the property taken, or allows it to be lost or injured for want of due care; (9) or puts any unnecessary hardship on the defendant, by maltreating him while under arrest, or purposely making the levy in a violent, insulting, or oppressive way, for example, at night, or at the defendant's store during business hours with vexatious leisure so as to injure his business; (10) if he delivers up the property to a claimant or other person without taking a sufficient security; (11) if he proceeds after receiving official notice or notice from the plaintiff that the process has been paid, stayed, superseded, or enjoined, but a mere statement by the defendant that he has paid is not enough; (12) if he does not follow the law as to advertising and selling, or unnecessarily sacrifices the property at the sale, or continues selling after enough has been realized; (13) if he buys directly or indirectly at the sale, was interested in or a party to

(29) Holker v. Hennessy, 141 Mo. 527.

the process, or was otherwise disqualified from acting (30); (14) if he fails to account for the surplus in any case, and for all if the writ is set aside while he holds the property or proceeds; or, (15) if he had no process or it was void. There are many other cases in which the officer would become liable to the defendant in the process; but those above mentioned occur most frequently.

§ 71. **Liability to strangers to process.** The officer may become liable to strangers to the process by any unnecessary interference with their persons or property (31). While the officer may enter the premises of strangers, or even break into their dwellings, after demanding admission, to take the person or property of the defendant therein; he is liable to them if he attempts to store property on their premises, or stays longer than is necessary to get it away.

Section 3. Place, Time, and Agents for Executing Process.

§ 72. **Where process may be executed.** Execution of process, beyond the limits of the territory to which the jurisdiction of the court or the officer's jurisdiction to act extends, amounts to nothing, though the process be addressed to that territory. Where the statutes provide that a court of one county may issue its process to and have it executed in another county, upon certain things being done, there is considerable dispute as to whether process issued and executed in the other county can be

(30) McMillan v. Rowe, 15 Neb. 520.
(31) Lammon v. Feusier, 111 U. S. 17.

avoided collaterally, or only upon direct attack for failure to comply with the statute (32).

§ 73. **How early.** If the officer presumes to execute the process before he receives it he is a mere trespasser. That he acted because he knew it had been made out and mailed to him, and that he afterwards received it and returned his action upon it, will not make the act valid nor excuse his trespass (33). But the moment he receives it with orders from the creditor to proceed he may execute it. The debtor can demand no indulgence of him. The attachment or garnishment writ may be executed before the summons to the defendant is served or issued (34).

§ 74. **How late.** The diligence with which the officer must proceed to avoid liability has already been considered (§ 68, above). The only remaining question under this head is the validity of delayed action. The attachment and garnishment statutes often require the defendant and garnishee to be served a certain number of days before the time for appearance mentioned in the process. In such cases, service less than that many days before the appointed time will usually be held bad on direct attack, and has been held void on collateral attack (35). When the writ expires, the officer's authority, except to complete acts begun, expires with it. A voluntary payment of money received by the officer from the debtor after the return day, if no levy has been made, is not held by him

(32) Kentzler v. Chicago, M. & St. P. Ry. Co., 47 Wis. 641.
(33) Wales v. Clark, 43 Conn. 183.
(34) Hargan v. Burch, 8 Iowa, 309.
(35) Southern Bank v. McDonald, 46 Mo. 31.

in his official capacity. The creditor cannot compel him to account by summary process of attachment, nor by proceeding upon his bond, but only by assumpsit or similar action. A levy after the return day is generally held to be absolutely void, though another levy had been made in season under the same process. The officer is a trespasser, and the purchaser gets no title (36). A levy after the officer has indorsed his return and filed the process is void, though the return day has not yet arrived. But a mere indorsement of the return on the process does not prevent a subsequent levy before the return day, and a levy on the return day is good (37). If a levy is made in time, the further proceedings (advertising, selling, disposing of the proceeds, and making return) may be had after the return day and after the writ has been returned, though no new authority has been issued, and the officer's term has meanwhile expired (note 37, above).

§ 75. **Who may execute process.** Process can be executed only by an officer duly authorized to execute such processes generally, or especially deputized to serve that particular process. Execution of a process by an unauthorized individual is void, and the possession of the process is no protection to him. Execution of process by a de facto officer is not void as to innocent parties, but the officer himself is not protected by the writ (38). Process can be executed only by an officer who has it in his possession, and is acting within the territory of his juris-

(36) Commonwealth v. Magee, 8 Pa. St. 240.
(37) Evans v. Barnes, 32 Tenn. (2 Swan.) 291.
(38) Green v. Burke, 23 Wend. (N. Y.) 490.

diction (39). Execution of process by an officer interested in it or party to it, or by one officer to whom it might be directed when it *is* directed to another (40), has been held absolutely void on collateral attack; but it seems that these matters should only be held to make the act voidable at most, and such is the opinion of several courts and text-writers of recognized ability (41). While property is held by an officer under one process, no other officer can take it. An officer who has levied upon property under one process may make a second levy under another process issuing from the same court (42), by simply indorsing it on the writ, though the actual possession is held by his receiptor. Yet even he cannot take it under process from any other court, without statute expressly authorizing such action; for he is merely the court's servant, and he cannot serve two masters whose orders may be inconsistent.

(39) Wales v. Clark, 43 Conn. 183.

(40) Gordon v. Camp, 3 Pa. St. 349.

(41) Terrill v. Auchauer, 14 Ohio St. 80; Freeman on Executions § 10; Alderson on Judicial Writs §§ 25, 98.

(42) Hewe v. Moody, 67 Tex. 615.

CHAPTER IV.

PROPERTY TAKEN, LEVY, AND SERVICE.

§ 76. **Comparative scope of processes.** Garnishment is not an appropriate process to arrest the person; nor is a fieri facias, to take intangible things. Most, if not all, writs are similarly limited as to their scope; but the great body of rules in this connection apply alike to all processes. Wherever capias lies in attachment it lies in execution. Whatever property may be taken in execution may be attached (1). Whatever cannot be taken under execution cannot be attached. In scope, garnishment differs from these principally in the fact above mentioned, and the further fact that it is peculiarly adapted to impounding obligations to pay. Moreover, it is not usually desirable nor available against real property; but in a few states the garnishee may be charged for land in his possession (2). Otherwise, almost any property liable to attachment or execution is liable to garnishment.

Section 1. Matters Peculiar to Garnishment.

§ 77. **Two grounds of liability.** The statutes contemplate two distinct classes of cases in which the garnishee may be charged: (1) when he has specific property in his

(1) Handy v. Dobbin, 12 Johns. 220.
(2) Webber v. Hayes, 117 Mich. 256.

possession belonging to the debtor, that is, when he is a bailee; (2) when he is indebted to the defendant (3). Of these in their order; but first, as to when the liability begins.

§ 78. **From what time reckoned.** The liability of the garnishee, whether as debtor or as bailee, depends upon the situation at the time fixed upon by the statute, which is usually the moment when the process is served on him. A very few statutes make it date from the time the officer receives the writ, and others allow his liability to be increased by anything occurring before he answers. The rule usually applicable is that no event subsequent to the date fixed upon can discharge him, if he was liable then; make him liable, if he was not liable then; nor increase or diminish the amount of his liability (4).

§ 79. **Garnishee as bailee.** The garnishee can be charged as bailee only for property liable to sale under execution, for when charged as such he discharges himself by delivering up the specific thing to the officer to be sold. It would be useless to charge a garnishee, if the thing could not be made available when surrendered. But, on the other hand, if the property is such that it could be sold under execution, that fact is pretty good evidence that the garnishee can be charged for it, unless it can be sold under execution only by virtue of some statute prescribing a specific procedure, in which case that procedure only can be followed. And a few statutes authorize garnishment only for property which cannot

(3) Allen v. Hall, 5 Metc. 263.
(4) Foster v. Singer, 69 Wis. 392; Webber v. Bolte, 51 Mich. 113.

be levied on (5). The property for which the garnishee can be charged as bailee will be considered when we come to discuss the matters applicable to all processes (§§ 81, 90 below). All that need be added under the present head is that the garnishee can be charged as bailee only for property actually within the control of himself or his bailee, independent of the control of the defendant (6).

§ 80. **Garnishee as debtor.** The fact that a debt presently owing is not payable till a future day, or till after demand, or is secured by mortgage or otherwise, or could be sued for only by the defendant and others jointly, is generally no defense to the garnishment (7). The garnishee can be charged as debtor only when he is proceeded against as debtor, and only on an unconditional liquidated obligation on contract or judgment, payable in money, not exempt under the statute from liability for debt, nor evidenced by any outstanding negotiable instrument, nor in suit or judgment in any other court (8). As a general rule, any defense which the garnishee could set up in a suit against him by his creditor is equally available when his creditor's creditor seeks to charge him on the debt, and no other defenses are available (9).

Section 2. Property Subject to Process.

§ 81. **General rule.** The policy of the law is to make the judgments of the courts effective, and for this pur-

(5) Brown v. Davis, 18 Vt. 211.

(6) First Nat. Bank v. Davenport &c. Ry. Co., 45 Iowa, 120.

(7) Moore v. Gilmore, 58 N. H. 529.

(8) Lehmann v. Farwell, 95 Wis. 185; Jones v. Crews, 64 Ala. 363; Reynolds v. Haines, 83 Iowa, 342; Thompson v. Gainesville Nat. Bank, 66 Tex. 156; Scott v. Rohman, 43 Neb. 618.

(9) Allen v. Hall, 5 Metc. 263.

pose the processes now being discussed have been provided. In keeping with this policy, we should expect to find the courts willing that these processes should be used in any way that bids fair to accomplish that purpose, without producing a greater evil than that for which the judgment was given. And such is the law. The use of a capias to make judgments effective has been restricted by statute, because the public has become convinced that its unrestricted use is more productive of evil than of good. If it be alleged that any property is not liable to executions, attachments, and garnishments, a good reason should be given to support the assertion. Therefore, in the discussion of this subject, we shall start with the general rule that all property is liable to the processes, and shall limit the statment by such exceptions as we find supported by sufficient reasons. The principal of these reasons are: (1) that the judgment or process is limited so as not to extend to the things proposed to be taken; (2) that they are not property; (3) that the defendant has not a sufficient estate in them; (4) that they are exempt. Of these in their order.

§ 82. **Judgment or process limited.** All judgments and processes are limited as to persons, place, and property. As to persons, they are limited to the person against whom the judgment is rendered or the process issued. The property of strangers cannot be taken, though they be equally liable with the defendant for the payment of the demand sued on. As to place, they are limited to the property within the jurisdiction (10). In attachment

(10) Lindley v. O'Reilly, 50 N. J. L. 636.

proceedings without personal service or appearance, the judgment is limited to the property attached; but if the defendant has appeared generally, the execution may be both general and special (11). When the judgment is general, the property of the defendant within the jurisdiction which can be taken is limited by the scope of the process, as above indicated (§ 76). If the process be against several, the officer may take their joint property, or, at his option, levy the full amount of the property of any one, disregarding the debtors' wishes as to selection, unless the process otherwise directs, or some statute secures these rights to defendants.

§ 83. **Things not property.** Many things contribute to our enjoyment of life which this branch of the law does not look upon in the light of property at all. The general rule in this connection is that nothing can be taken under process as property, unless the thing may be sold. Thus, intoxicating liquors where prohibited (12), burglars' tools, dies to counterfeit the public currency, or any other thing, the sale, manufacture, and possession of which is unlawful, are not property nor liable to seizure to satisfy debts. Again, the right to sue for a tort is not property. It cannot be sold separate from the thing upon which the tort was committed, and the wrong-doer cannot be charged as garnishee by reason of his liability for it (13). Again, any franchise granted by the public to an individual, or license granted by one individual or corporation to another, as a seat on the stock exchange, is not prop-

(11) Pennoyer v. Neff, 95 U. S. 714; Conn v. Caldwell, 6 Ill. 531.
(12) Kiff v. Old Colony, &c. Ry. Co., 117 Mass. 591.
(13) Lehmann v. Farwell, 95 Wis. 185.

erty, but a personal privilege. In the same connection, may be mentioned the right of an author to publish his manuscript or to withhold it, and the monopoly of authors and inventors secured to them by the patent and copyright laws (14). All of these have been held not liable to any legal process to enforce judgments; sometimes, on the ground that they are not property, and sometimes on other grounds. But, in most of these cases, and it may extend to all yet, the courts have held that the advantages of these privileges may be made available for the satisfaction of judgments, by invoking the extraordinary jurisdiction of the equity courts (15). Again, notes, bonds, judgment records, title-deeds, and other evidences of title or indebtedness are not property in such a sense that they are liable to seizure and sale on any process to enforce judgments, unless there be a statute making the seizure of the written evidence equivalent to the seizure of the things evidenced (16). Such statutes in regard to notes and bonds are not uncommon.

§ 84. **Defendant's estate insufficient.** A thing which is property may not be liable to the process, because the defendant has not a sufficient estate in it. At common law, nothing could be taken in which the defendant's estate was merely equitable, because the law courts did not recognize a merely equitable title, and the equity courts enforced their decrees by coercion. But statutes have been passed in most of the states making such estates li-

(14) Dart v. Woodhouse, 40 Mich. 399; Stevens v. Gladding, 17 How. 447.

(15) Ager v. Murray, 105 U. S. 126.

(16) Freeman on Executions § 112.

able; and the codes which have abolished the distinctions between law and equity have largely contributed to the same effect (17). Property in which the defendant has a vested legal estate is often held not liable, because other persons have estates in the same property which might be prejudiced by a seizure and sale. Under this head, may be mentioned future estates in chattels, which could be seized only by ousting the particular tenant; property in which the defendant has only an undivided interest as joint tenant, tenant in common, or partner; and cases in which his estate is subject to a mortgage, pledge, or lien to another. But in most states, if not in all, each of these estates is held liable to some of the processes without statute, or is made so liable by statute (18). What are called future contingent estates may also be mentioned under this head. They are not estates at all, but only possibilities of future acquisition, and for that reason are not liable to the processes (19). The sheriff cannot levy on a hope. The same reason exists, and the rule equally applies, to property for the purchase of which the defendant is negotiating, but title to which he has not yet acquired; and so, as to money sent to pay a debt owing to him, but not yet paid over (20). When, on the other hand, a creditor of the seller tries to get it, he is too late if the title has passed (21).

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(17) Freeman on Executions § 116.

(18) Moore v. Gilmore, 16 Wash. 123; Smith v. Menominee Circuit Judge, 53 Mich. 560.

(19) Ducker v. Burnham, 146 Ill. 9.

(20) Buchanan v. Alexander, 4 How. 20.

(21) Moore v. Davis, 57 Mich. 251.

§ 85. **Things exempt: Grounds enumerated.** A thing within the scope of the judgment and process, which is property, and in which the defendant has a sufficient estate, may be exempt on any of several grounds. The principal grounds of exemption are the following: (1) that a statute makes the thing exempt for the use of the defendant and his family, so that they may be self-supporting and honorable members of society rather than burdens upon it; (2) that the seizure and sale would practically destroy the thing, which is sometimes called an equitable exemption; (3) that the personal security of every individual and the public peace would be endangered by allowing such seizure; (4) that the thing is serving the public in its present use, and that service would or might be interrupted by a seizure; (5) that the thing is now in the possession of some other state agency, and could not be taken by this court or officer without an unwarranted violation of the authority and interruption of the business of the other. Of these in their order.

§ 86. **Statutory exemptions.** Statutes exist in every state, making certain property exempt from all processes to enforce judgments and decrees. These statutes are not uniform. The courts construe them very liberally in favor of the debtors; for example, they are usually available to non-residents unless restricted to residents, extend to the proceeds while traceable and not put to some other use, and cannot be waived in advance by anything short of a pledge or mortgage.

§ 87. **Equitable exemptions.** Some property otherwise liable is exempt, on the ground that extreme hardship

would be inflicted on the defendant by the seizure and sale, without any commensurate gain to the creditor. For example, title deeds, bonds, and manuscripts are not property as such, but merely evidence of property; yet the material used to make the record has some value as waste paper. The law will not allow them to be sacrificed for this pittance (§ 83, above). Again, growing crops would often be worth something in the immature state; but the law will not permit them to be so destroyed. So, of articles in course of manufacture which would be substantially destroyed by interference with them; for example, hides in a tan-vat, dough in a bake-oven, and bricks, charcoal, and potters' wares, being fired. So, of property so perishable that it would spoil before it could be sold. Yet the greater part of these difficulties may be avoided. The court may order the perishable property sold on the spot. Statutes usually provide that filing a notice of levy on growing crops shall be equivalent to an actual seizure, and that the crops may be left to stand till they mature. The sheriff may stand by till the process of manufacture is complete and then levy; or, though he cannot be compelled to do it, he may levy at once and complete the process of manufacture himself, if he is willing to assume the risk of failure, in which case he is liable only for want of ordinary care (22).

§ 88. **Peace and security exemptions.** Property on the defendant's person is not liable, because the seizure of it is necessarily such an indignity to the wearer that a breach of the peace would be almost certain to follow.

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(22) Cheshire National Bank v. Jewett, 119 Mass. 241.

Moreover, the right to make such seizures would destroy the personal security of everyone, and open the door to numerous abuses (23). The same reasons are at the foundation of the rule that the officer shall not break into the defendant's dwelling to levy on his property (24).

§ 89. **Public service exemptions.** The property of individuals and corporations which is being used in the public service—the cars on which the public is being carried, the water-works by which it is being supplied with water, even the coal being used to fire the engines that draw the cars or pump the water, or any other property being used in the public service—is exempt from seizure under any process as long as the service continues (25). The same reasons conspire with others, to be mentioned in the next subsection, to prevent the property of public corporations being taken (26); and it has even been held that the fees of public officers could not be taken by garnishing the individuals owing them, because the appropriation of the fees to the payment of the debt might prevent the public from getting the service (27). Land was not liable under the feudal system; and the reason commonly given is that the public defense and revenues depended on the tenure. But now real property is liable by statute in every state.

§ 90. **Jurisdictional conflict exemptions.** That the public business may be carried on with any success at all,

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(23) Holker v. Hennessey, 141 Mo. 527.
(24) Bailey v. Wright, 39 Mich. 96.
(25) Gardner v. Mobile & N. Ry. Co., 102 Ala. 635.
(26) Klein v. New Orleans, 99 U. S. 149.
(27) Sexton v. Brown, 72 Minn. 371.

it is necessary that no department of the state should interfere with the affairs of any other, except in the manner provided by law. Whenever any department of state takes possession of anything to do anything with it, no other department has any right to interfere, otherwise than for the purpose of supervising according to the authority given it. This fact prevents one constable from taking property out of the hands of another, even on a process from the same court (28); and, with greater reason, prevents any officer taking property from an officer of another court, and prevents every court from interfering with or attempting to command any person in carrying out the orders of any other court. Judgment debtors cannot be required to answer as garnishees in a court other than the one that rendered the judgment, because that would be interfering with the power of the court to enforce its judgment (29). Property being administered by probate courts cannot be taken from their officers on processes issued from other courts; nor can these officers be required to answer as garnishees in any other court, because the doing of either of these things would be interupting the business and violating the jurisdiction of the probate court (30). Even property that has been released on bond is still exempt (31).

Section 3. Levy and Service.

§ **91. In general.** Having ascertained what may be taken, we must next consider what must be done to take

(28) Hewe v. Moody, 67 Tex. 615.
(29) Scott v. Rohman, 43 Neb. 618.
(30) Hudson v. Saginaw Circuit Judge, 114 Mich. 116.
(31) Hagan v. Lucas, 10 Peters, 400.

it. What must be done depends upon the nature of the process in hand and the statutes affecting it. When attachments issue at the commencement of the action, the officer receives a process consisting of two parts; or else the parts are wholly divided, and he receives two processes. In either case, one is a command to summon the defendant; the other, to attach his property. Where the attachment issues in a pending action no new summons is necessary. While the garnishment process does not consist of these two distinct parts, it equally serves a double purpose—as original process commencing an action against the garnishee, and as a command to him to hold the defendant's property. An execution contains no command to summon, for the defendant has already had his day in court. However, many statutes require that the debtor shall be notified that the attachment or execution has been issued and levied, or that the garnishment has been issued and served. From what has been said it will be seen that the execution of the processes consists: (1) of levying on and disposing of the property of the defendant according to law and the command of the process; (2) of serving the original processes to commence the actions against the defendant and garnishee; and (3) of serving the defendant with notice of the execution, attachment, or garnishment, and of what has been done under it, where such notice is required by the statute. These three will now be considered in the order named; but, under the first, only the essentials to perfect the levy will be considered, the further proceedings to sale being treated subsequently (§§ 118-22).

§ 92. **Levy on land.** The modern statutes do not require any actual entry to effect a levy on land, but provide as a substitute that the officer shall indorse a certificate of levy upon his process, and that notice of this shall be filed in some public office. Under these statutes the land must be described with the same certainty that is necessary to pass title by deed, and is not bound till the notice is filed as required (32).

§ 93. **Levy on chattels: Sufficiency.** An actual levy is usually required in the case of chattels. To levy is to seize. The decisions are not entirely harmonious as to what constitutes a sufficient seizure; and probably much depends upon the manner in which the question arises, and the nature of the property seized. If the defendant has submitted to the levy, it is immaterial, so far as he is concerned, whether the officer ever saw or possessed the property (33). A doubtful act and declaration of levy by the officer would estop him in an action by the defendant against him for a wrongful levy, though insufficient in a contest between two officers as to which had made the first levy. What would be considered no seizure of a buggy might be a sufficient levy on a red-hot casting or a herd of wild horses (34). The test usually applied is to de-

(32) McGregor v. Brown, 5 Pick. 170.

(33) Walker v. Shotwell, 21 Miss. 544.

(34) Portis v. Parker, 8 Tex. 23; Long v. Hall, 97 N. Car. 286. A levy on corn in a crib by nailing it up, notifying the defendant and other spectators of the levy, and so leaving it without a guard, was sustained against a subsequent purchaser from the defendant. Richardson v. Rardin, 88 Ill. 124. A levy on hay in a barn by posting notice thereof on the door without moving the hay or leaving anyone in charge was sustained. Merrill v. Sawyer, 8 Pick. 397. Contra: Bryant v. Osgood, 52 N. Hamp. 182. A levy on grain in a stack by going to it and forbidding the defendant to touch it was sustained. Gallagher v. Bishop, 15 Wis. 276.

termine whether the officer so interfered with the property that he would be liable to an action of trespass by the defendant but for the protection of the process; and in this respect it is said that he must have touched the property or a part of it, or must have declared that he was levying on it, while he was so situated that he could see it and might have touched it if he had wished to do so (35). Therefore, an officer who goes to a building to levy on its contents, and, being unable to get in, proclaims at the door that he levies on all the property in the building, has made no levy, though he guard all the doors and windows so that no one could get in or out without his knowledge. An assignment after his alleged levy or an actual levy by another officer would prevail. Secret levies are void as to third parties. The levy should be so open and notorious that every one may know of it. The effect of failure to retain possession after levy will be considered later (§ 114).

§ 94. **Same: When no levy necessary.** While the officer is in possession and control he cannot, in the nature of things, make a seizure; and no new seizure is necessary in such cases. The very act of delivering the process to him to be levied on property in his possession, operates as a levy from the time of the delivery, without any act or intention on his part (36). Though the property be at the time in the actual possession of another person, acting as keeper for the officer, no new formal levy is necessary; but not so, if the property has been returned to the defendant.

(35) Green v. Burke, 23 Wend. (N. Y.) 490.
(36) Field v. Macullar, 20 Ill. App. 392.

§ 95. **Same: Order of seizure, inventory, appraisement, indorsement on process, etc.** The statutes make numerous requirements of the officer in executing the processes; for example that he shall, at the time of receiving them, write down the hour; that he shall not take realty where there are plenty of chattels; that he shall make a written inventory of the property taken; that he shall indorse on the writ a statement that he has made the levy, describing the property taken, etc. Though these things are to be done before or at about the time of making the levy, they are no part of it. Levies should not be held void because these requirements are disobeyed; and in some cases should not be held even voidable, though they would usually be so (note 36, above).

§ 96. **Effect of fraud or unlawful act.** A levy otherwise valid should be held to be voidable, most courts say void, if it is accomplished by means of any fraud or unlawful act; for no one should be permitted to take advantage of his own wrong, and no lawful thing can stand on an unlawful foundation (37).

§ 97. **Attachment and garnishment summonses.** The essentials of valid service of summonses on garnishees and defendants in attachment differ in no respect from the essentials of service of any other original process. The one is necessary to get jurisdiction to render a judgment in personam against the defendant; the other, to render a similar judgment against the garnishee (38). Defects in the service which would not be fatal on other

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(37) Bailey v. Wright, 39 Mich. 96.

(38) Compare Pennoyer v. Neff, 95 U. S. 714.

processes should not be held fatal in these cases; but there are decisions which make distinctions on the ground that these proceedings are statutory. Appearance by the defendant without service, or after defective service, waives the objection as to that; and appearance by the garnishee waives the defect in the service as a summons as to him—several courts say, as an attachment also.

§ 98. **Notice of attachment, garnishment, or execution.** The notice often required by statute to be given by the officer to the defendant, or to the person found in possession, to inform him of the levy of the execution or attachment, or the service of the garnishment, must not be confounded with the summons spoken of in the preceding subsection. No such notice is necessary, unless the statute requires it; and failure to give it if required, or when or as required, would seem, on principle, to be a mere irregularity, rendering the levy or service liable to be quashed on proper application by one entitled to complain. But there is a prevalent disposition on the part of the courts, while acknowledging that this would be the only effect in case of executions, to consider this notice jurisdictional in cases of attachment and garnishment, apparently on the ground that these proceedings are statutory (39).

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(39) Freeman on Executions §§ 257, 262.

CHAPTER V.

LIEN AND FORECLOSURE (SALE).

SECTION 1. WHEN LIEN BEGINS.

§ 99. **At common law.** When the statutes passed in the reign of Edward I first made lands liable to execution to satisfy judgments, the courts held that the land was liable on the judgment of a citizen from the time the judgment was rendered; on recognizances and statutes merchant and staple from the day the recognizance or statute was acknowledged; and on the demand of the king from the day when the liability was incurred. These decisions did not depend upon any provisions of the statutes (1). The courts felt that a lien from these dates respectively was necessary, lest the defendant should defeat the judgment by conveying his property away. The same rule has been adopted by several of the American courts where the writ of elegit was used, and might with equal propriety be applied to the use of the fieri facias; but it is not so applied in states where no lien is provided for by statute, and in most states a statutory lien is given (2). But the common law judges felt that too great mischief would result from holding the chattels liable to execution from the day the judgment was ren-

(1) Massingill v. Downs, 7 How. 760.
(2) Woods v. Mains, 1 G. Greene (Iowa) 275.

dered; and, therefore, they held that the plaintiff could have execution only of the chattels which the defendant had the day execution was sued out, or which he afterwards acquired, and not of those which he had sold between the day on which the judgment was recovered and the day of execution sued (3).

§ 100. **Under statute of frauds.** In promulgating these rules, probably the judges were not thinking of judgments having effect before they were rendered, nor of executions dated back and withheld from the officer. But by a fiction of the common law, all judgments were presumed to have been rendered on the first day of the term, and the lien upon lands dated from that time; so that a bona fide purchaser might lose his property by the lien of a judgment rendered after his purchase. A practice also obtained of dating back executions to the first day of the last preceding term; and, worse than this, it became customary to take out executions for the purpose of obtaining security, or perhaps of protecting the debtor, without any intention of delivering them to the officer to be executed. By this means chattels were taken from persons who had purchased them for value without notice of the judgment, and perhaps a considerable time before it was rendered. These evils induced the provisions in the statute of frauds, 29 Charles II (1677) c. 3 §§ 13-16, that the officer signing the judgment record shall put down the exact day of doing so, that the judgment shall be a lien upon the land only from that time, and that no fieri facias or other execution shall bind the goods of the

(3) Fleetwood's Case, 8 Coke 171; Green v. Johnson, 9 N. Car. 309.

defendant till it is delivered to the officer to be executed, and he was required to indorse thereon the time of receiving it. In most American states the provisions of this statute with regard to liens upon land are substantially embodied in their statutes; and, in nearly half of the states, the provision with regard to chattels is also followed.

§ 101. **Modern American rule.** Under the statute of frauds the defendant might sell his chattels for value to an innocent purchaser after the sheriff had received his writ, and before he had done anything to give notice of the lien; from which it will be seen that the statute did not entirely obviate the old evil. In the absence of any statute governing the matter, the supreme court of Iowa held that they could not adopt the old common law rule, which was so unjust that it had to be changed by statute, and that the commercial spirit of the age is so averse to secret liens that they could not recognize any claim by the creditor till the moment of levy (4). Similar considerations have induced the legislatures in a number of states, and the number is still increasing, to adopt the same rule, by which the lien of the execution before levy is entirely abolished.

§ 102. **Attachments and garnishments.** Attachment of property, except as a species of distress, was unknown to the common law; and, therefore, we have no old decisions as to when the lien of an attachment commences. The attachment statutes in Arkansas, Indiana, and Kentucky provide that the lien shall attach from the delivery

(4) Reeves v. Sebern, 16 Iowa, 234.

of the writ; in Pennsylvania it relates to the teste, provided that it shall be defeasible by any bona fide purchase before levy; and in Tennessee the attachment in chancery is made a lien from the filing of the bill. Some of the statutes expressly provide that the lien shall date from the levy; but the most of them contain no provision concerning it; and where such is the case it has been universally held that the attachment creates a lien from the time the goods are actually levied on, and not before (5), even by courts that had held in the absence of controlling statutes that an execution creates a lien from the time it is issued, or from the time the officer received it. So, also, garnishment is held to create a lien upon the property in the hands of the garnishee, from the date of the service of the writ upon him, and not before (6).

Section 2. Nature of Lien.

§ 103. Against officer. For any breach of his duty, the officer is liable to the plaintiff in an action against him as an individual, in an action on his official bond, and by summary proceedings in the court and cause in which the wrong was committed. The nature of the creditor's right has already been sufficiently discussed in considering his right to control the processes, and in speaking of the liability of the officer; and what was then said need not be here repeated (§ 68, above).

§ 104. In property before levy. A judgment lien on land is superior to an execution lien on chattels, in that it is not cut off by a levy and sale under a junior judg-

(5) Pond v. Griffin, 1 Ala. 678; Taffts v. Manlove, 14 Cal. 47.
(6) Fisher v. Hall, 44 Mich. 494.

ment. The creditor's lien on chattels before levy, where such a lien is allowed, is not an interest in any specific property of the debtor; but merely a right to have it taken to satisfy the judgment. For example, the legislature may exempt the property by a law passed after the officer receives the process; or the defendant may acquire the benefit of the statute by marrying during that time. Again, if the officer fails to levy before the return day the lien expires; and it is liable to be defeated before that time by a levy under a junior process from another court (7), but not by a prior levy by the same officer or his deputy under a junior process from the same court (8). Again, he cannot maintain a suit in equity to require third persons to deliver property to the sheriff to be levied on under his process, nor at law to recover damages for concealing or injuring property which he might have levied upon. His right to maintain an action against the defendant and others at law for a conspiracy to defraud him by keeping the property beyond his reach, or in equity to set aside a fraudulent conveyance have been denied on this ground; but no lien is necessary to maintain such actions, and they should be sustained. His right to have the property taken, if it can be found, is not defeated by a sale for value to an innocent purchaser (9), by the death of the defendant (10), by his becoming a bankrupt, nor by a removal of the property to another county and sale by the defendant to an inno-

(7) Pulliam v. Osborne, 17 How. 471.
(8) Kennon v. Ficklin, 6 B. Mon. 414.
(9) Boucher v. Wiseman, Cro. Eliz. 440.
(10) Parsons v. Gill, 1 L. Raym. 695.

cent purchaser, or levy under the writ of another creditor there, provided the property is returned and levied before the return day or a testatum fieri facias is issued to the other county and levy made thereunder.

§ 105. In property after levy. The levy does not divest the defendant of his title; he may sell or mortgage as before (11). The judgment lien on land does not unite with the lien of the execution or levy. A person who buys land subject to the judgment lien, but before the lien of the execution attaches, gets title free from the claim of the creditor, if the judgment lien expires before the sheriff's sale, though it had not expired before the levy (12). Yet the judgment lien on land and the lien of a levy on chattels are very similar. The creditor who loses thereby may maintain an action on the case against anyone who injures the land on which he has a judgment lien or lien by levy; a garnishing creditor may maintain a similar action against anyone who interferes with the defendant's property in the garnishee's possession (13); and an attaching or execution creditor may maintain a similar action for such injury whenever he has no other remedy. There are several decisions in which such actions were dismissed, on the ground that the plaintiff's only remedy was against the officer, and only the officer acquired an interest by the levy; or on the ground that the creditor's remedy against the officer was exclusive, wherever he had a remedy against the officer; or on the ground that the plaintiff had not shown that there was

(11) Bigelow v. Willson, 1 Pick. 485.
(12) Wells v. Bower, 126 Ind. 115.
(13) Erskine v. Staley, 38 Va. 406.

not sufficient other property to satisfy his claim. Probably these courts would agree with the decisions holding that after purchasing at the sale he may sue in trover for a conversion before the sale (14). But there are other cases in which actions by the creditor at law and in equity have been sustained against third persons interfering with the property in the officer's possession, although the creditor had a right of action against the officer (15); and these last mentioned decisions seem correct. Of course, a creditor having a lien by levy could not maintain trespass, trover, or replevin against anyone for interference with the property, for he has no right of possession (16). If the creditor would rather have the property itself or its proceeds than look to the sheriff or third persons, he may have it retaken after the officer has abandoned it, provided he can get it before it is encumbered or levied upon under another process. If the same officer has sold it under a junior process, he may have the proceeds paid over to him on motion to the court before they are paid out, or sue the junior creditor for them after they are paid (17); but he cannot take the property from the purchaser at the sale under the junior writ, for that would destroy the faith in sheriff's sales.

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(14) Baker v. Beers, 64 N. H. 102.

(15) Field v. Macullar, 20 Ill. App. 432; Howland v. Willetts, 9 N. Y. 170.

(16) Blake v. Shaw, 7 Mass. 505.

(17) Richards v. Morris, 20 N. J. L. 136; Field & Macullar, 20 Ill. App. 432.

Section 3. Loss of Lien After Levy.

§ 106. **By order of court.** Independently of any statute, from the necessity of the case, every court has jurisdiction to quash any garnishment, attachment, execution, or other proceeding pending before it, either before or after the levy or service has been made (18); and no other court has any right to do so, except as a court of review. The power of the judge to quash writs and levies during vacation is very doubtful, to say the least, unless given by express statute, as it usually is with reference to attachments. Many statutes empower court commissioners or the court's clerk to quash attachments during vacation, when the judge is absent.

§ 107. **Who may complain.** The plaintiff certainly has standing to invoke the court's action to quash his process and levy, though he seldom asks the favor. The defendant is equally entitled, and is usually the party moving for such action. In the absence of statutory provision, strangers claiming to own tangible property levied upon are generally considered to have no standing to invoke any action in the proceedings, and as having a sufficient remedy by replevin, trespass, and trover, for the property or its value. Statutes usually provide that any claimant may intervene, and, where such is not the case, persons interested in the property, as other creditors of the same debtor having liens upon it, will usually be admitted (19). But there are several courts in which the right has been denied. They say, "Courts of justice are not open, like

(18) Commonwealth v. Magee, 8 Pa. St. 240.
(19) Hawes v. Clement, 64 Wis. 152.

tournaments, for errant knights to enter and tilt at pleasure'' (20).

§ 108. **Procedure.** A bill in chancery for an injunction, and proceedings in a court of review on error, mandamus, certiorari, and prohibition, are not generally appropriate nor available, if there is a remedy in the court that issued the process. Proceedings by audita querela in the same court was the remedy formerly employed to obtain relief from unjust levies; and this may still be used, no doubt, if not abolished by statute. But a simple motion, in the same court and cause, with reasonable notice to the other persons interested, is so much cheaper, easier to prosecute, and more expeditious, that it is almost the only procedure now in use; except where a special procedure is provided for by statute, as to which the statutes of the state should be consulted.

§ 109. **Grounds for quashing lien.** The court may order the process or levy quashed or adjudge the lien subordinate: (1) because it is absolutely void, and this objection is available to anyone in any form of procedure; (2) because the rights of other persons require it to be quashed or made subordinate, though it be not void.

§ 110. **Same: Available to defendants.** The defendant may have the process or levy quashed because of any irregularity not amendable nor waived—for example, that the affidavit, bond, or process was too early or too late, not executed or improperly executed, or did not contain all of the essential parts; or because the facts alleged to obtain the attachment did not exist—for example, that

(20) Porter v. West, 64 Miss. 548.

the defendant had absconded, was a non-resident, or fraudulently contracted the debt sued for; or because the cause of action had been extinguished since the attachment was issued, or the judgment on which the execution issued had been satisfied, either before or after the process issued (21). Or, admitting that the preliminary requirements were observed and that the process is regular, he may have the levy quashed because of any fraud or illegal act in effecting the levy, and for many irregularities; or because the property is exempt. But he cannot object that the property belongs to another, and is being used to pay his debts; that is his good fortune. He will not be allowed to deny that he owes the debt for which the attachment issued, for that would require a trial of the merits of the action. He cannot urge that the judgment on which the execution issued is incorrect, for he has had one day in court on that question.

§ 111. **Same: Available to claimants and garnishees.** Claimants who intervene may have the process or levy quashed if it is absolutely void, or upon allegation and proof that it is being used as an instrument to defraud them as creditors of the same debtor. But they will not be permitted to litigate matters between themselves, show that the defendant does not owe the amount claimed of him by the plaintiffs, take advantage of any irregularities in the proceedings, nor show that the property attached does not belong to the defendant. The issue is whether the property belongs to them, not whether it belongs to the defendant. The court will protect any interest, legal

(21) Wills v. Chandler, 2 Fed. Rep. 273.

or equitable, which they prove belongs to them. While a garnishee may show that the property does not belong to the defendant, and may take advantage of jurisdictional defects in the principal action, he can object to no irregularities except those in the proceedings against himself.

§ 112. **Abandonment of lien: By election of remedies.** When a creditor has an election between several remedies without a right to pursue more than one, his choice of any one is an abandonment of any rights he might have under the others. Thus, when a man having a judgment lien on land sues out a capias and imprisons the defendant under it, and afterwards obtains recourse against the land by the release of the debtor, he takes it subject to all rights acquired during the interval (22). But when a creditor may proceed under several processes at the same time, his action under any one does not disparage his right to proceed subsequently under any other (23); and a levy on certain property by the officer, even at the direction of the creditor, is not an abandonment of the lien, which the delivery of the writ to him created on any other property necessary to satisfy it. A subsequent levy on the other property during the life of the writ will overreach all rights acquired after the lien commenced.

§ 113. **Same: By dropping proceedings.** No doubt the lien should be, as it has often been, held to be abated by settlement and abandonment of proceedings without completing them, or by appropriating the property levied

(22) Rockhill v. Hanna, 15 How. 189.
(23) Spring v. Ayer, 23 Vt. 516.

on and abandoning without settlement (24). Returning the process, taking out another, and making a levy under it on other property have been held not to show an abandonment; and when the new levy is on the same property the whole proceedings under the second process may be treated as mere surplusage and the sale sustained as if made under the first.

§ 114. **Same: By surrendering possession.** If the officer or garnishee abandons without the plaintiff's knowledge or consent, he is entitled to have the property retaken, but the rights of innocent persons acquired during the interval will be protected. There are a great many cases in which it is stated in broad terms that the retention of possession is essential to the continuance of the lien; but most of these are cases in which the rights of other persons have intervened, and the great majority of the cases hold that the lien is not lost by the officer's leaving the property in the possession of the defendant (25).

§ 115. **Laches and abuse of process.** Mere delay in prosecuting is not an abandonment; but from it the court or jury may find an intention to abandon, and very slight delay has often been adjudged such an abuse of process as will entitle a junior creditor to priority. No delay by the officer without the plaintiff's authority or knowledge will have this effect; but an unreasonable delay will justify the jury in finding knowledge and sanction by the creditor.

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(24) Wilder v. Weatherhead, 32 Vt. 765; Allen v. Hall, 5 Met. 263.
(25) Conn v. Caldwell, 6 Ill. 531.

§ 116. **Failure of action or judgment.** The lien by garnishment is abated by the death of the garnishee before judgment against him, or by the death of the defendant before judgment against him, unless the statute provides otherwise; and the same is true of attachment. But the lien of an execution levied is unaffected by the death of either party (§ 29, above). Cases are numerous in which the lien has been held to be abated by departures from the prescribed procedure, but this question has been sufficiently discussed already (§§ 45-50, and see §§ 121-22). A judgment and the lien of the execution thereon may be allowed to subsist while the judgment is opened to try a special defense; and an appeal, motion for a new trial, and the like, would have no effect on the execution or lien. But if the judgment be absolutely set aside the foundation of the execution is gone, and it must fall; and with it, the lien. So if the execution be set aside. Likewise, if judgment be given for the defendant in any action, all attachments and garnishments pending thereon must fall unless saved by a proper appeal (26).

§ 117. **Substitute bond.** The cases are not agreed as to whether the lien of the levy is divested by the defendant giving a bond to obtain a release, replevin, appeal, new trial, injunction, or stay of proceedings; but it is substantially agreed that no such effect would follow the giving of any bond by a claimant (27).

Section 4. Foreclosure of Lien.

§ 118. **In attachment and garnishment.** The lien which the creditor acquires by an attachment levy can be fore-

(26) Erickson v. Duluth Ry. Co., 105 Mich. 415.
(27) Rocco v. Parczyk, 77 Tenn. 328.

closed only by prosecuting the action against the defendant to judgment, and having the property sold on an order to sell or execution issued on that judgment. We need not consider the steps required to obtain a judgment, since they are the same in such cases as in other actions. Likewise, the lien acquired on property by garnishment can be perfected only by prosecuting the principal action to judgment, if that has not already been done, and by prosecuting the garnishment to judgment against the garnishee. When the garnishee is charged as bailee, that is, for specific tangible property in his possession, it is also necessary to take out execution, levy it on the property, and proceed to sale as in other cases; or, if the garnishee fails to produce the property on demand, to levy upon and sell any of his executionable property to an equal amount. But when the garnishee is charged as debtor, he may safely pay the money into court or to the plaintiff, as soon as the judgment is rendered and recorded against him, without waiting for execution to issue (28).

§ 119. **Proceedings in garnishment from summons to judgment.** The summons to the garnishee gives him a certain time, named therein or in the statute, until which he is not liable to default for not answering. Under some statutes his answer is a mere formal pleading; but under most statutes the plaintiff is entitled to a personal examination, on oral interrogatories, in open court, either in the first instance or upon an unsatisfactory answer being made. If the garnishee be a corporation, the

(28) Barber v. Howd, 85 Mich. 221.

plaintiff is entitled to an answer by some agent having knowledge of the facts. If the plaintiff is satisfied with the answer, he may allow the cause to be continued till he is ready to take judgment, being careful not to entitle the garnishee to have it dismissed for laches (29). But if the garnishee has not confessed liability, the plaintiff must join issue on the answer or file a supplemental complaint, according to the practice, bring the issue to trial, and adduce such evidence as would prove liability in an action by the defendant against the garnishee; or the garnishee will be entitled to a discharge. The trial of this issue is conducted very much the same as other trials.

§ 120. **Conduct of execution sales.** The statutes usually specify with considerable particularity: (1) what notice of the sale shall be given—for how long, in what language and publication, where posted, who personally notified, etc.; (2) where and when the sale shall be held—on the premises, at the county seat, on a business day, between nine a. m. and six p. m., etc.; (3) how the sale shall be conducted—personalty offered before realty, at auction, to the highest bidder, for cash, in parcels, within view of the property, after clearly pointing it out, etc.; (4) what the officer shall do after the sale—in disposing of the proceeds, in giving evidence of title to the purchaser, in making report of his doings to the court, etc. Obviously it would be out of place to attempt a discussion of each of these requirements at length in an article of this kind. The requirements are quite different in different states, and the reader is referred to the statutes. To the statu-

(29) See Webber v. Bolte, 51 Mich. 113.

tory requirements the courts have added others; for example, that the officer shall not directly or indirectly buy at the sale, that he must be otherwise competent as hereinbefore indicated, etc.

§ 121. **Effect of defects.** Without attempting to speak of each of the requirements in detail, it may be said, that, if the property is simply handed over to the creditor without a sale, or the garnishment is dropped on payment by the garnishee to the creditor, without the garnishment being carried to judgment, the title of the defendant is not divested, and the creditor acquires none of which he can avail himself even on collateral attack (30). On the other hand, it seems pretty clear that the proceedings are not liable to collateral attack because of any irregularities in them. If the officer has sold without the proper notice, at an improper time or place, en masse, on credit, or the like, he may be liable to an action by anyone injured who has not waived his right to sue; and, on that ground, the sale would be set aside on a proper and seasonable application by anyone prejudiced by the default. But it is not liable to collateral attack (31). The sheriff's deed is not void because it misdescribes the judgment, or does not describe it at all.

§ 122. **Officer's return.** The purchaser's title does not depend on the officer making a true return or any return at all, nor on his accounting for the proceeds. The officer's return is his report to the court of his doings under the process; and should be in writing, on the back of the

(30) Allen v. Hall, 5 Metc. 263.
(31) Cavanaugh v. Jakeway, 1 Walker's Ch. (Mich.) 344.

process or on some paper attached thereto, dated, and signed; and should state in detail just what the officer has done, and not merely that he has executed the process according to law. A return is never too late to be valid (32); but the officer is liable to amercement by the court, or an action for damages by the party injured, if he fails to return it on or before the return day (33). The return may be amended by the officer without consent of the court at any time before the officer surrenders possession of it; but afterwards, only on special order.

(32) Smith v. Osgood, 46 N. H. 178.
(33) Burk v. Campbell, 15 Johns. (N. Y.) 456.

CHAPTER VI.

SATISFACTION AND SUBSEQUENT RIGHTS.

Section 1. What Constitutes a Satisfaction.

§ 123. **Outline.** What remains to be said regarding satisfaction of judgments may be considered under the following heads: (1) by use of the court's processes; (2) by setting off against other judgments; (3) by recovering another judgment; (4) by lapse of time; (5) by payment. Of these in their order.

§ 124. **By use of process.** Any satisfaction of the judgment by use of the court's processes without actually realizing the amount is only conditional at most; and this question has been sufficiently considered already (§ 30). Conceding that arresting the defendant on ca. sa. and releasing him, or seizing his property on fi. fa. and releasing it, would operate as a satisfaction of the judgment (and there are several decisions denying the last part of the proposition), no such result would follow from surrendering priority in favor of a junior creditor (1). Though such action would release a surety, and would entitle a person having an intermediate lien to priority; even these results would not be produced by the court erroneously decreeing priority to the junior creditor, and the senior creditor acquiescing therein (2).

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(1) Bank of Pennsylvania v. Winger, 1 Rawle (Pa.) 295.

(2) Hamilton v. Mooney, 84 N. Car. 12.

§ 125. **By setting off against other judgments.** In the absence of statutes touching the matter, courts have such power over their judgments that they can order one set off against another. When a person desires a judgment in his favor credited on a judgment against him, he must apply to the court in which the judgment stands against him, for no other court could enter satisfaction on it. In such cases, the court will order satisfaction entered upon condition that satisfaction to an equal amount be entered on the other judgment. The rules as to mutuality of parties are much the same as upon setting off other demands.

§ 126. **By recovering another judgment.** The judgment cannot be used after a judgment has been recovered on it. See Judgments, § 37, elsewhere in this volume. Recovery of judgment against one of several persons jointly and severally liable does not satisfy a judgment previously recovered against another of them. But satisfaction of one of such judgments, in whole or in part, whether it be the largest or the smallest, satisfies all in the same proportion.

§ 127. **By lapse of time.** At common law, no action could be maintained on a judgment over twenty years old without proving that it had not been paid; which might be shown by recent acknowledgements of it, payments on it, etc. A lapse of less time would sustain a finding of payment. In this country, some states have adopted the common law rule by statute; while others have shortened the time, and required the acknowledgements to be in writing.

§ 128. **By payment: To whom.** If the debtor is given no directions to the contrary by the owner of the judgment, it is satisfied to the amount paid by a payment to any of the joint creditors; to the attorney who recovered the judgment (3); to an officer having process to collect the judgment not yet returnable, or on which a levy was made before the return day and remains undisposed of; or to the court's clerk while authorized by statute. And in all of these cases it does not matter that the money so paid is never accounted for to the owner of the judgment. But payment does not satisfy in the absence of express authority to receive it, when it is made to an officer who has no process on the judgment, or who has process past due on which no levy has been made, or whose process was issued on the order of the party making payment and without authority from the creditor (4); nor when made to the clerk, while execution is in the hands of the sheriff or before the judgment was rendered; nor when made to anyone but the real owner of the judgment, if he has notified the debtor to pay no one else. For example, the real owner may recover notwithstanding payment to the nominal plaintiff; and a person having a lien on the judgment as attorney or otherwise (5), or to whom a part interest in the judgment has been assigned, may recover, notwithstanding a payment to the judgment creditor, provided the debtor has been notified not to make such payment.

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(3) McCarver v. Nealey, 1 G. Greene (Iowa) 360.
(4) Osgood v. Brown, Freem. (Miss.) 392.
(5) Andrews v. Morse, 12 Conn. 444.

§ 129. Medium and amount. Neither the attorney (6), the clerk of the court, nor the officer executing the process can receive anything other than money in payment, nor give satisfaction for more than the amount actually received, unless such action is specially authorized or afterwards ratified by the owner of the judgment. When these agents have received something other than money, either as payment or to be converted into money and applied, it has been held that in doing so they acted as agents for the debtors; and that, if they convert into money but do not account for it, it is no payment, and the creditor is entitled to a new execution or to sue over. Of course, the creditor may bind himself by receiving anything in payment which satisfies him; but the courts are not agreed as to whether he is bound by a satisfaction in full of an absolute judgment, in consideration of a payment in money of a part of it by the defendant.

§ 130. Whose payment satisfies. Assignment and subrogation. Payment of the amount of the judgment by a stranger, on executing an assignment of the judgment to the latter, does not satisfy it; and the assignee is entitled to execution (7). When a stranger at the request of the debtor advances the amount to pay a judgment, with a mutual understanding that the judgment shall be kept alive for his benefit, he is entitled to have it enforced by execution, though no formal assignment was executed. So, when one who has purchased property subject to a judgment lien pays the creditor, with a like understand-

(6) McCarver v. Nealey, 1 G. Greene (Iowa) 360.
(7) Steele v. Thompson, 62 Ala. 323.

ing, to save the property. The same privileges have been accorded to sheriffs, who have had to pay the amount because they failed to collect it on executions given to them (8), to sureties who have paid (9), and even to one of the principal debtors, who has paid the full amount when the others should have paid in equal proportion. But, by the great weight of authority, the judgment is satisfied as soon as the creditor receives payment from the sheriff, or from one of the debtors, though he be only a surety and the payment be made under the guise of taking an assignment. This is because it would not be safe to make a man a judge of his own rights; but each of these parties is entitled to redress, by action at law for money paid to the use of the real debtor, or by bill in equity for subrogation to the rights of the creditor (10).

Section 2. Rights After Satisfaction.

§ 131. Proof and entry of satisfaction. As a necessary incident of its power to administer justice, every court has jurisdiction to inquire whether its judgments have been satisfied, and to enter satisfaction on its records whenever a satisfaction in fact is found (11). The procedure is to move that satisfaction be entered, give all persons interested notice of the motion, and support it by such proof as the facts afford (12).

§ 132. Appeal after satisfaction. The courts are not agreed as to whether an appeal may be maintained after

(8) Heilig v. Lemley, 74 N. Car. 250.
(9) Southeren v. Reed, 4 H. & J. (Md.) 307.
(10) Bones v. Aiken, 35 Iowa, 534.
(11) Bailey v. Hester, 101 N. Car. 538.
(12) Abercrombie v. Chandler, 9 Ala. 625.

the judgment has been satisfied; but the better view seems to be that an appeal lies in favor of a defendant, who has paid to avoid execution being issued, or in favor of a plaintiff, who has accepted payment of what was awarded him without taking it as payment in full. One who has attempted to enforce a judgment in his favor might with greater reason be held to be precluded from seeking to avoid it.

§ 133. **Restitution on reversal.** On reversal of the judgment after sale on execution under it, or after payment of the amount by the defendant to avoid execution, the defendant is entitled to be restored to his original position. He may without demand sue the plaintiff for the amount, or, at his option, for the specific property taken if the plaintiff purchased it at the sale. The courts are not agreed as to whether the amount which he can recover is the amount which the property brought at the sale, or its real value.

§ 134. **Protection of third parties when judgment is reversed.** A garnishee is protected by payment of the debt or delivery of the property on the judgment against him, although the defendant afterwards obtains a reversal of that judgment, or of the judgment in the main action (13). When a stranger to a judgment purchases property at a sale under execution thereon, his title is unaffected by the subsequent reversal of the judgment, though he knew that an appeal was pending or might be taken (14). This rule has been held to extend to one who was interested in

(13) Troyer v. Schweizer, 15 Minn. 241.
(14) Gould v. Sternberg, 128 Ill. 510.

the sale as a junior lien-holder, but not to the attorney for the creditor on whose judgment the sale was made. If this protection were not allowed, said Lord Coke: "The vendee would lose his term and his money too, and thereupon great inconvenience would follow, that none would buy of the sheriff goods and chattels in such cases, and so execution of judgments (which is the life of the law) would not be done" (15). Some courts have thought that the purchaser should be equally protected when he purchases while the appeal is pending, though the purchaser at the sheriff's sale was the plaintiff or his attorney; but this is generally denied, because the reasons for the rule do not seem to require it (16).

§ 135. **Vacating false satisfaction.** The general powers of superior courts give them jurisdiction to set aside satisfactions entered on their judgments; and they will do so whenever justice requires it. But the clerks of these courts possess no such powers. Justices of the peace cannot vacate their judgments; and by analogy of reason, would seem to lack power to vacate satisfactions entered on their judgments. The only remedy in such cases would seem to be to sue over on the judgment (17). Whether a court should vacate a satisfaction produced by a sale of the property of a stranger, or of exempt property, is disputed; but the majority of the courts favor setting aside the satisfaction and issuing a new execution in both of these cases, in favor of the plaintiff if he was the purchaser at the sale, or for the use of the purchaser

(15) Manning's Case, 8 Coke 94, 97.
(16) Singly v. Warren, 18 Wash. 434.
(17) Piper v. Elwood, 4 Denio (N. Y.) 165.

if he was a stranger (18). A few courts have set aside satisfaction and issued new executions, because the property was encumbered for more than it was worth; but it is generally held that the satisfaction cannot be set aside because the purchaser was mistaken as to the quality of the property or the value of the defendant's estate in it (19). And it is quite generally agreed that no action can be maintained by the purchaser against the sheriff or the plaintiff for the money paid, nor against the defendant for the loss from an excessive bid. There is no warranty at such sales. Caveat emptor applies.

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(18) Watson v. Reissig, 24 Ill. 282.
(19) Poppleton v. Bryan, 36 Ore. 69.

APPENDIX A.

INTERNATIONAL LAW.

§ 1. How is public international law distinguished from private international law?

§ 2. What gives a rule of international law its binding character of law?

What are the sources of international law?

§ 3. What event in the seventeenth century marked the beginning of a new epoch in the history of international law?

§ 5. Is a colony of a nation a sovereign state?

§ 6. A state which is a monarchy is divided into two parts, one part remaining a monarchy and the other adopting a republican form of government. Is the identity of the former state lost?

§ 7. What is the difference between a state under the protectorate of another state and a state under suzerainty?

§ 8. What does a recognition of the independence of a revolting community before the revolting section has in fact achieved its independence amount to?

§ 9. In what cases is recognition of belligerency by other states than the parent state allowed?

§ 10. What effect has the conquest of one state by another upon the treaties made by the conquered state?

§ 12. In what cases is one state permitted to enter upon territory of a foreign independent state?

By the Monroe Doctrine in 1823, the United States declared that it would not permit third parties to intervene in America to subdue infant communities which had proved too strong for Spain. Could acts done by the United States under this policy be justified by the rules of international law?

§ 13. What is meant by intervention?

§ 15. When is intervention justified?

§ 16. In X country persons accused of crimes are not given the right to a trial by jury. Has another state a right to intervene to prevent this?

§ 17. Is intervention to preserve the balance of power justifiable?

§ 21. A government explorer of X country discovers an island and returns to his country. A year later Y country sends a delega-

tion to formally occupy the island. Ten years later a sailing vessel with only citizens of Z country on board is wrecked near the island and the crew and passengers establish their home on the island. What country has title to the island?

§ 24. How can the acquisition of territory by prescription be justified?

What is the length of time required to give title by prescription?

§ 25. What is title by accretion?

§ 27. X state cedes certain land on one side of a river to another state. Where is the boundary line?

§ 29. X country is under the protectorate of Y country. A citizen of Z country is wrongfully held a prisoner by X country. Is Y country bound to interfere?

§ 30. What is a sphere of influence? How is its size determined?

§ 36. What is meant by "marginal seas"?

§ § 31-39. X and Y states are divided by a navigable river. A crime is committed on a public ship of Z state while navigating the river. Which state has jurisdiction to try the offender?

§ 40. How is piracy punishable? By what form of punishment?

§ 42. How may citizenship in the United States be acquired?

§ 43. Can a subject of Germany be held to military duty upon his return to Germany after becoming naturalized in the United States?

§ 45. What military service may aliens be compelled to render?

§ 46. The sovereign of X state is travelling in Y state. The authorities of Y state are trying to capture an escaped convict. The sovereign of X state harbors the convict in his house. What remedy have the authorities of Y state?

§ 49. Who has jurisdiction over troops of one country passing through another?

§ § 50, 51. What is the distinction between public ships and merchant vessels in territorial waters of another state in regard to the jurisdiction?

§ 54. What is a political offense?

§ 60. How is a diplomatic mission terminated?

§ 66. A treaty is signed by the agent of X state on January 12, 1892. It is ratified April 3, 1892. From what time did it take effect?

§ 68. X and Y states neither having a sea coast boundary agree by treaty not to maintain navies. Later X state acquires territory on the sea coast and is threatened with invasion by the fleet of Z

country. X state then builds a navy. Is this a violation of its treaty with Y state?

§§ 77, 78. What is the difference between retorsion and reprisal?

§ 84. What is meant by "reasonable necessities of war"?

§ 89. What determines the enemy character of persons?

§ 93. What are the reasons for not permitting a capturing army to destroy immovable public property?

§ 98. When is property upon the seas impressed with enemy character?

§ 102. What laws are granted in territory under military occupation?

§ 106 What requirements must be observed by a bombarding fleet before the bombardment is begun and while it is gong on?

§ 112. What are the different modes of termination of war?

§ 114. What is the principle of postliminium?

§ 127. What is contraband of war?

APPENDIX B

DAMAGES.

§ 1. What is the difference between the forms of relief granted by law courts and courts of equity?

How is legal judgment for damages enforced?

§§ 2, 3. White sees Green's bull at large in Green's garden, and it is apparent that if the bull is not driven out, it will cause damage to the garden amounting to $100. He goes over and succeeds in driving the bull back into its pasture and penning it up, but in doing so he breaks Green's clothes-line post which is worth $5. Green sues him for trespass. What damages can he recover, if any?

A dealer has built up a large trade in oil. A large corporation opens a branch agency in competition with him, and sells its oil at a price below the actual cost of production, until it succeeds in diverting a large part of the dealer's trade. The dealer sues the corporation, claiming as his damages the amount of profits which he shows he has lost through loss of sales of his oil. Can he recover?

A retail grocer had been in the habit of making all of his purchases from the plaintiff Company, who were wholesale grocers. The retailer's employes, upon the order of their union, declared a strike, and during the continuance of the strike the plaintiff Company was damaged in the amount of $100 through loss of sales to the retailer. It sued the union for this amount. What decision?

Jones owns an amusement park into which he invites the public, to witness a free base-ball game. Bearing a grudge against Brown, he refuses to the latter permission to enter; but Brown afterwards succeeds in entering while Jones' back is turned. Jones finds him in the grounds, ejects him, and sues him for trespass. Can he recover damages?

§§ 4-6. Jones suffers a legal injury without any damages. What can he recover?

Dale writes and publishes defamatory words about Hale. The words cause Hale no damage. Has Hale an action against Dale?

What is meant by the measure of damages?

§§ 7, 8. Plaintiff contends that defendant negligently ran his

automobile into defendant's automobile thereby injuring plaintiff. The court instructs the jury that if they find the defendant was negligent they shall find him guilty and assess the damages at $200. Is there any objections to this instruction?

§ 9. Upon what principle are excessive damages set aside by the court?

§ 10. Upon what principle does a court disturb a verdict for inadequate damages?

§ § 11-14. What is meant by nominal damages?

Jones contracts with Clark to take care of his lawn for a year, Clark to pay five dollars a month. At the end of the second month, when Clark has paid ten dollars, Jones refuses to go on with the contract. Clark without any trouble or expense procures another man for four dollars a month to do the same work. Clark brings an action against Jones for breach of contract. What can he recover?

White, without permission, goes into Mason's yard and takes his lawn mower which he uses for a few hours. He then cleans and sharpens it and returns it in better condition than before. Mason brings an action for trespass and for the wrongful taking of his lawn mower. What can he recover?

§ § 16-19. The action is for trespass for false imprisonment under a warrant plainly illegal. The court refuses to interfere with a verdict for $1,500 damages, though it appears that so far as actual injury is concerned $100 would have been enough. Is this proper?

In an action for breach of contract the court instructs the jury that if they find the defendant guilty they shall award besides the actual damages, exemplary damages to the amount of $200. Is this instruction good?

§ § 20, 21. The conductor of a train arrests a passenger in an illegal, wanton, and oppressive manner, the company not having in any way authorized or ratified the act. Is the company responsible in exemplary damages?

A brakeman acting in the course of his employment unecessarily makes a violent attack upon a passenger. Is this a proper case for a verdict for exemplary damages against the railroad?

A telegraph operator acting within the scope of his employment, but negligently or in bad faith, transmits a libellous message. Is the company responsible in exemplary damages?

§ 22. What is the fundamental principle of the law of damages?

§ 24. What is the difference between liquidated damages and a penalty?

§ § 25, 26. Gale sells Buck a newspaper establishment, with subscription list and good-will for $3,500, Gale agreeing not to establish any newspaper within certain limits, and in case of breach to pay $3,000 as liquidated damages. Are the $3,000 liquidated damages or a plenalty?

On May 1, 1890, Mack contracts with Johnson to sell him a share of stock, the market vaule of which is $150, on August 1, 1891 for $100. They agree that $50 shall be "liquidated damages" for the non-performance of this contract. On August 1, 1891 Mack refuses to sell. At this time Johnson is able to buy stock in the market for $110. Johnson brings an action for the breach of contract and claims $50 as liquidated damages. What decision?

§ § 28-32. A railroad company wrongfully refuses to furnish a shipper with transportation for stove wood. May the measure of damages include profits which would have been made on a contract with a third person for the sale of the wood?

In an action for personal injuries, a book canvasser, receiving for his services a certain percentage on sales, offers to testify to the amount of his annual sales for several years prior to the injury. Is the evidence admissible?

In an action for personal injuries by a railway coupler and switchman, receiving $1.50 per day, he is asked, as a witness, as to his prospects of promotion to better paid employment. He testifies that he thinks he would have been promoted; that there is "a system" by which "if a man falls out you stand a chance of taking his place," and that yard conductors obtain a salary from $60 to $75 per month. Is the evidence of the chance of promotion admissible to be submitted to the jury in connection with the wages of employees in the superior employment?

§ § 33, 34. In an action for the price of a steamboat, the vendee claimes the right to deduct from the contract price the expense incurred in remedying defects of construction and the loss of profit on trips that might have been made but for the defects. What decision?

§ § 35-37. In an action for personal injuries may recovery be had for future pain and suffering if it is reasonably certain that such damages will necessarily result?

The action is by the owner of land upon the surface against the lessee of coal seams below, for injury arising from a subsidence.

The lessee had the right to make the excavation. The plaintiff has recovered before for a prior subsidence caused by the same excavation. What decision?

Williams contracts to deliver to Watkins 50,000 pairs of bicycle pedals, delivery to be made and paid for in installments. After delivering 2,608 pairs Williams refuses to go on, and Watkins sues for breach. What damages can he recover?

What damages can be recovered when the cause of action is for a nuisance?

§ 40. What relation must the defendant's breach of duty bear to the plaintiff's damage in order to make the defendant liable?

§§ 42-49. A package owned by plaintiff is negligently destroyed by defendant. Is the defendant responsible for the loss of jewels contained in it, although he had no knowledge of the nature of the contents?

A physical injury stimulates a pre-existing tendency to disease and causes an outbreak. Is the defendant responsible for the ensuing damage if the tendency was caused by plaintiff's voluntary intemperance?

In an action by a railway company for maliciously causing the arrest of an engineer, while engaged in running plaintiff's train, will the damages include the delay of the train?

§§ 50-53. Defendant agrees to supply plaintiff, a butcher, with ice, knowing the plaintiff's object to be to keep meat fresh, but fails to do so, in consequence of which a considerable amount of meat is spoiled. Does the measure of damages include the value of the meat spoiled?

French agrees to furnish a coal company with a locomotive engine to draw coal cars. French knows that it is for a track of unusual with, and that such engines are not to be hired, when wanted. He does not know that the possession of the engine would enable the company to mine more coal than without it. The company is able to transport coal by other means at a greater cost. What will be the measure of damages for breach of the agreement?

Buck having contracted to sell and deliver to a railroad 400 tons of steel-capped rails, engages the defendant to supply the rails, the latter having notice of the purpose intended. Buck has a patent for capping the rails, and there is no market price for such an article. Is Buck entitled, on breach, to the profits he would have realized?

§§ 54-56. Hale employs Gale to effect insurance upon his property, which Gale neglects to do. Hale knows of this and makes

no attempt to get someone else to insure his property. Can Hale hold Gale for a loss by fire?

§ 61. What is meant by non-pecuniary damage?

§ 70. In an action for non-delivery of oil sold, is it error to refuse evidence that at about the time of the delivery the principal oil dealers made a combination to create an artificial scarcity and an unnatural price?

§ 74. In what case will damages include interest?

§ 81. In what cases involving the sale of chattels can the vendor recover the contract price?

§ 90. Where the purchase price is the measure of damages, is the recital of consideration in the deed conclusive?

§§ 100-104. Parents sue for the death of a son, 30 years of age. He did not live in the same house with his parents but near them. He had been in the habit of visiting them and making presents amounting to about $200 a year. What damages should the parents recover?

APPENDIX C.

BANKRUPTCY.

§ 4. What is the date of the first English bankruptcy law? Who were amenable to it?

§ 5. In what respect was the English act of 1705 different from the first act?

How is bankruptcy regulated in the United States?

§ 7. What effect has a Federal bankruptcy act upon state bankruptcy laws?

§ 8. What is the difference between a voluntary and an involuntary bankrupt?

§ 9. What is necessary before a natural person may be a voluntary bankrupt?

§ 10. A corporation is engaged principally in the business of buying and selling real estate. All the stock in the corporation belongs to one man. Its debts amount to $1,000. Can it be made an involuntary bankrupt?

Can a corporation organized for the purpose of acquiring and holding stock in mining corporations be made an involuntary bankrupt if its debts amount to $1,000?

Can a farmer who makes a profit of $2,000 a year and who owes $1,000, be made an involuntary bankrupt?

Olsen is engaged in cutting grass and trimming lawns in the summer time, and shoveling snow and attending to fires in the winter time. He has some regular customers who pay him by the month, and by others he is employed and paid by the job. His proceeds average $1,400 a year. Can he be made an involuntary bankrupt if his debts amount to $1,000?

Two merchants are engaged in business in partnership. One has individual debts of $800, and the other has individual debts of $700. The partnership owes $500. Can the partnership be put into involuntary bankruptcy?

§ 11. An Arizona corporation owning a reservoir and irrigation ditches sells water to farmers. If its debts amount to $1,000 can it be made an involuntary bankrupt?

§§ 14, 15. The petition states that the corporation is chartered

as a printing company but does not state that the corporation actually engages in such business. Is the petition good?

§ 18. Has a creditor, who has received from the debtor an assignment and bill of sale of his property with knowledge or reasonable cause to believe that the debtor was at that time insolvent, a right to join in the petition?

§ § 19, 20. What is meant by act of bankruptcy? When is an act of bankruptcy not necessary in order to permit a man to go into bankruptcy?

§ § 21-27. Jones has debts amounting to $5,000. With the exception of $7,000 in the bank, he has no property. He draws out this money and secretly purchases a piece of real estate, from Heckman. He has the deed made out as if the land were conveyed by Heckman to Loring and has this deed recorded. By a secret agreement between Jones and Loring, Jones is to get all the rents and profits from the land. Has Jones committed an act of bankruptcy?

Mack has debts amounting to $6,000. He has personal property worth $8,000. He sells this personal property for $2,000 to his sister-in-law who takes the goods, keeps them in her possession for two days and then delivers them back to Mack telling her friends that she is "going to let him borrow them for awhile." Has Mack committed an act of bankruptcy?

§ 30. When is it an act of bankruptcy for a debtor to give away property?

§ 38. How may creditors force a debtor to commit an act of bankruptcy?

§ 43. What are the duties of the receiver? Has he power to prosecute suits at law that have been commenced by the debtor?

How long does a receiver stay in office?

§ § 44-50. Has the trustee of a bankrupt insurance company power to waive the performance of conditions by the insured?

What are exemption laws?

§ § 51-66. What property of the bankrupt does not pass to the trustee?

§ 68. What power has the trustee in regard to the sale of property which has been transferred by the bankrupt in fraud of creditors?

§ 79. Has a trustee the power to avoid a preference where the debtor had not the intent to prefer?

§ 82. An innkeeper gives lodging to Watson. Watson leaves without paying his bill and the innkeeper holds his trunk as security

for the bill. Watson was insolvent when he applied for lodging but the innkeeper did not know this. A month later he is declared bankrupt and the trustee claims a right to the trunk. The innkeeper contends that he has a right to have the bill paid in full before giving up the trunk. What decision?

§ 96. Fox has agreed with Locke not to cut down certain shade trees growing on his lot and to pay a penalty of $1000 if he should cut them down. Fox becomes insolvent. Has Locke a provable claim against him if Fox has not cut down any trees?

§ 98. Is the trustee allowed to set up against a claim the defenses which the debtor had?

§ 110. A person discharged in bankruptcy wrote to a creditor whose debt had been dischargd and said, "I do not calculate that you will suffer any loss by me." Is this sufficient to revive the debt?

Pending a suit, defendant pleaded an adjudication of bankruptcy, but subsequently withdrew the plea and confessed judgment. Is the judgment binding on him?

§ 119. When is one discharge in bankruptcy a bar to a subsequent discharge?

APPENDIX D.

JUDGMENTS.

§§ 2, 3. How is a judgment distinguished from a ruling? From an order?

A judgment is given by a court and an entry made on the record. A few days later the record is destroyed by fire. Is the judgment valid?

§ 4. A statute provides that the board of health shall have power and it shall be its duty to receive and examine into the nature of complaints made by any of the inhabitants concerning nuisances and shall have power, after due notice and hearing, to order the suppression and removal of nuisances and conditions detrimental to health found to exist within the limits of its jurisdiction. Is this board of health a court?

§§ 5, 6. An action for killing plaintiff's horse is brought before a justice of the peace who has jurisdiction to hear cases involving $200 or less. Plaintiff and defendant both agree that the horse was worth $200 and the plaintiff asks for $200 damages. In fact the horse was worth $300 and this amount is the correct measure of plaintiff's damage. Has the justice jurisdiction to hear the case? Would a judgment for $300 damages be valid?

§ 7. White contracts with Green in Illinois to convey to him certain property in Kansas. At the time for performance White refuses to convey and Green brings an action against him in Illinois for specific performance. The court orders him to convey. What effect has this order upon the title to the property?

§§ 8, 9. Mack wished to sue Jackson for a breach of contract. Process was served on Jackson's brother who resided with him and who promised to deliver the process to Jackson but failed to do so. Judgment was entered against Jackson by default. Was the judgment binding?

§ 16. In Illinois what constitutes the formal record of the proceedings of a suit?

§ 18. How are justice court records kept?

§ 19. A judgment is rendered but the clerk neglects to record it. A year later, the judge, on his unsupported recollection, orders the record made. Is the judgment binding?

§ 22. The record of the judgment does not show the form of action. Is the judgment good?

§ 24. Jones brings an action of replevin against Wilkes for a horse. Judgment is entered for Wilkes, the record stating that he had title and right to possession. Is this record a good defense to an action by Jackson for the possession of the horse?

§ 27. What is the difference between amending a record and amending a judgment?

§§ 28-30. A judgment contains a clerical error in computation which appears on the face of the record. What remedy has the injured party after the term?

A judgment in favor of defendant and against plaintiff is procured by fraud and collusion between plaintiff's attorney and defendant. What remedy has plaintiff after the term?

§§ 35-41. In a civil action to establish dower, can the plea of res judicata be supported by the acquittal of the alleged husband on a trial for bigamy in having married the plaintiff in the suit for dower?

§ 42. Is a corporation which, with knowledge that an attorney had filed a bill in its name, allows the suit to be prosecuted to final decree without objection, bound by the decree if the attorney was not employed by it?

APPENDIX E.

ATTACHMENTS, GARNISHMENTS, AND EXECUTIONS.

§ 1. How is a decree of divorce executed?

§ 2. What was the ancient method commonly used in enforcing judgments and decrees?

§ 5. How does replevin differ from the other common law actions?

§ 6. What is a capias ad respondendum?

§ 7. In a certain state, by statute, garnishments issue only as a form of execution after judgment. Jones brings an action against White for an alleged breach of contract. Can he garnish past due wages of White's in the hands of White's employer?

§ 8. What can be sold under a writ of fieri facias?

§ 10. What can be sold under a writ of levari facias?

§ 12. How much of the debtor's land could be taken by the writ of elegit?

§ 14. What is the difference between a writ of habere facias seisinam and habere facias possessionem?

Which is the proper one, where the debtor is a life tenant?

§ 17. What is the general rule in regard to the issuance of executions?

§ 19. In what states does the issuance of an execution not depend upon the form of the action?

§ 20. Defendant hired a barge from plaintiffs for a certain sum per day, with an agreement that, if it were not returned in as good condition as when hired, defendant was to pay the agreed value of the barge as upon a sale. The barge was returned in a worthless state. Will the plaintiff's claim support an attachment under a statute allowing the use of attachment in actions on conracts?

§ 22. Attachment was issued on the ground that defendant had disposed of and concealed property with intent to defraud creditors. On motion to dissolve the attachment defendant proves that the property alleged to have been secreted belonged to his wife. Plaintiff then proved that defendant had not enough property subject to execution to satisfy plaintiff's demand which by statute is a ground for issuing an attachment. Will the attachment be dissolved?

Would it have been otherwise if both grounds had been given by the plaintiff for the issuance of the attachment?

A statute allows the issuance of an attachment on the ground that the defendant has not enough property to satisfy the demand. Plaintiff sues out an attachment to secure two demands and proves that the defendant has not enough property to satisfy both demands. On motion to dissolve the attachment defendant proves that one of the demands was not due. Will the attachment be dissolved?

Attachments were issued against two defendants on debts for which they were jointly liable. One of the grounds of each attachment was that the defendant did not have property enough subject to execution to satisfy the debts. The defendants together owned enough property to satisfy any one of the debts. Can the attachment be sustained against either one of the defendants?

An attachment was granted on the ground that defendant had not enough property to satisfy plaintiff's demand. On a motion to dissolve the attachment it was proved that the debt included money loaned to defendant by plaintiff's wife. Will the attachment be sustained as to the whole demand?

§ 24. February 12, 1901, the declaration is filed. February 15, an attachment is issued and February 23 the summons is served. Is the attachment good?

Will an attachment issued after judgment be sustained?

§ 25. Judgment is confessed before the clerk in vacation and execution issued before the judgment is entered of record. Is the execution valid?

§ 26. Judgment is rendered against defendant April 1, 1905. It is entered of record on April 15, 1905. April 5, 1906 execution is issued and the property sold. Jones, the purchaser at the execution sale, brings ejectment against the defendant, who resists on the ground that the execution was void. What decision at common law?

§ 29. Watson as the guardian of Johnson, an infant, brings an action against defendant for a breach of contract. Judgment is rendered for plaintiff. After the death of Watson, execution is issued. Is the execution void? Suppose the judgment had been revived on scire facias after the death of Watson?

§ 33. Judgment is rendered against defendant. Farson, a third party, pays the debt due from defendant to plaintiff. May Farson take out an execution against defendant?

§ 34. Black buys property at an execution sale held under an execution issued in the name of the judgment creditor without his consent. Does Black get title to the property?

§ 37. Judgment in an action on a bond is taken against the surety. Execution is issued against the principal in the bond and his property sold. Does an innocent purchaser at the execution sale get good title?

§ 38. Judgment is rendered against Watkins, an infant, for breach of contract. The statute provides that infants shall not be liable on contracts except for necessaries. This was not a contract for necessaries. Execution is issued against defendant and his property sold. Does a purchaser at the sale get good title?

§ 40. Can a court holding a debtor's property be a garnishee? May the property of a railroad be seized on execution?

§ 41. Where does a court get its power to issue execution?

§ 43. In what cases can execution be issued on a judgment that has been appealed from?

§ 44. Is an execution issued by an officer who was the plaintiff in the suit, valid?

§ 45. A statute provides that before any attachment shall be executed, the plaintiff shall make and annex thereto an affidavit specifying the indebtedness, and another section prohibits the issuance of an attachment unless the amount stated in such affidavit exceeds $200. The amount of indebtedness was left blank in the affidavit and was filled up after the attachment was executed. May the attachment be attacked collaterally?

§ 47. Is an attachment on an affidavit sworn to ten days before the issuance of the writ, valid?

§ 48. A statute allows attachments on the ground that the debtor has absconded or concealed himself to defraud creditors. Can an attachment be sustained founded on a complaint in the affidavit that "defendant has privately removed himself out of the county, or so absconded and concealed himself that process cannot be served"?

§ 49. The affidavit alleges indebtedness by Jones, a member of the firm of Jones and Smith, to Walker. Can the firm be charged as garnishee?

§ 51. Why is a bond usually required before the issuance of a writ of attachment and not in the case of garnishments?

§ 52. What is the venue of a process?

What should the body of the process contain?

§ 53. What effect has a judgment upon an invalid process issued before judgment?

§§ 54, 55. The clerk's signature at the end of the process, as required by statute, is left off. Will an execution sale under such a process be held void on direct attack? On collateral attack?

§ 63. A justice whose jurisdiction is limited to $100 issues a writ of attachment in an action to recover $153 on two notes, each providing that a justice should have jurisdiction to the amount of $300. Will the writ protect an officer executing it?

Will a process of attachment issued under an unconstitutional law protect the officer executing it?

A writ is made returnable to the municipal court at a term more than 60 days after it was made, contrary to the provisions of a statute. Will a sheriff who attaches property under the writ be protected?

A statute authorizes the issue of an attachment where a resident debtor secretly leaves the state with intent to defraud his creditors. The attachment stated that defendant, a resident of New York City, had absconded from the city with intent to defraud his creditors. Will a sheriff making a levy under this attachment be protected?

§ 64. How can an officer protect himself if he is in doubt as to whether the process under which he is going to act will protect him or not?

An officer innocently takes property belonging to Black under a process issued against Green. Black sues the officer and recovers damages. Has the officer recourse to the creditor for reimbursement if no bond of indemnity was given. Could he recover on an express promise to indemnify?

§ 56. An attachment is issued in X county, returnable to a court in Y county. The defendant appears in the court in X county which issued the writ and pleads to the merits. Is the attachment valid?

§ 57. A judgment was obtained in favor of plaintiff as administrator. The execution under which the land was sold recited the judgment as in favor of the plaintiff in his private capacity. Did the purchaser at the sale acquire a good title?

One of two joint plaintiffs dies after the judgment is rendered. No entry of his death is made in court. Should the execution be taken out in the names of both the plaintiffs?

Is an execution against an administrator invalid if it does not show on its face whether it is to be satisfied out of the individual

property of the defendant or out of the property of the deceased in his hands?

§ 60. A statute provides that a writ of attachment without a seal is of no validity. January 12, 1906, an attachment without a seal is issued to secure a debt not yet due. January 20, 1906, suit is commenced and judgment rendered for plaintiff on March 2, 1906. In April, 1906, the legislature passes an act providing that all attachments hereafter or heretofore issued without seals shall be valid if otherwise conforming to the law. Is the attachment issued January 12, 1906, valid?

§ 62. What are the three means that an officer has of protecting himself?

§ 66. Does delivery of process to an officer give him a property right in the property which the process directs him to take?

§ 70. Can an action be maintained against an officer for using an automobile which he has seized under a writ of attachment? By whom?

§ 74. A statute provides that a writ of attachment must be served at least four days before the time for appearance mentioned in the process. It is not served within this time and judgment is entered against defendant by default. The property is sold. Can the purchaser prevail in an action of ejectment against defendant?

§ 80. Jones, a creditor of Ford, garnishes money in the hands of Latham, whose defense is that the money is due not to Ford individually but to the firm of Ford and Smith. What decision?

§ 83. Wilkes is suing Watson for damages for breach of contract. It is doubtful whether he will recover or not. Can Watson be charged as garnishee by a creditor of Wilkes?

§ 88. Why is property on the defendant's person exempt from process?

§ 92. How is a levy on land effected under modern statutes?

§ 98. What is the effect of failure to give statutory notice in the case of executions? Attachments? Garnishments?

§ 101. In the absence of statute, what is the modern American rule in regard to the time when a creditor's lien on chattels begins?

§ 106. May a lien be lost by order of court after a levy has been made?

§ 111. A claimant seeks to have the levy quashed by showing that the property attached does not belong to the defendant. Is this sufficient?

§ 118. Property is attached. Later a judgment is obtained against the defendant. What is necessary in order to realize on the property?

§ 122. Does a purchaser at an execution sale get good title if the officer does not account for the proceeds?

§ 129. A creditor gets a judgment for $100. The defendant gives him a horse worth $70 and gets a receipt in full. Is the creditor entitled to an execution for $30?

§ 132. In what cases may an appeal be maintained after the judgment has been satisfied?